157-46

RECORD, CASE No. 14,649.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1176~~. ~~167~~ ~~455~~ 172

DANIEL M. FROST, APPELLANT,

vs.

FREDERICK T. M. WENIE AND JESSIE WENIE, HIS WIFE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MAY 18, 1891.

RECORD, CASE No. 14,649.

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vs.

FREDERICK T. M. WENIE AND JESSIE WENIE, HIS WIFE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1891.

1 DANIEL M. FROST, Plaintiff,
vs.
FREDERICK T. M. WENIE and JESSIE WENIE, His Wife, Defendants. } Complaint.

In the Circuit Court of the United States for the District of Kansas.

Plaintiff says that he is a citizen of the United States and of the State of Kansas; that defendants are citizens of the United States and of Kansas; that this action is brought to determine the ownership of certain real property located in Ford county, Kansas; that the value of the said property is more than two thousand dollars; that the determination of the rights of the parties hereto to the land in controversy involves the construction of certain statutes and treaties of the United States, to wit, the act of Congress of Dec. 15th, 1880 (21 Stat., 311), providing for the disposal of certain portions of the Fort Dodge military reservation, and the act of May 28th, 1880, providing for the sale and disposal of certain lands of the Great and Little Osage Indians in the State of Kansas, and certain alleged treaties between the United States and the said Osage Indians.

Plaintiff alleges that, being duly and legally qualified so to do under the homestead laws of the United States, on the first day of October, 1881, he made, in accordance with the rules and regulations of the Land Office, a homestead entry at the Larned, Kansas, land office of the following-described lands then subject to entry at said land office under and by virtue of the act of Congress of December 15th, 1880, to wit: Lots 9, 10, 11, and 12, in section 25, township 26 south, of range 25 west, and lots 14 and 15, of section 30, township 26 south, range 24 west, located in Ford county, Kansas, and being a part of the Fort Dodge military reservation; that
2 pursuant to said entry he immediately settled upon the said lands, and within six months thereafter built a habitable house thereon and moved into the same with his family and commenced his residence thereon, and has continuously resided in the said house upon the said land and made it his exclusive home during all of the time thence hitherto, and still resides thereon.

On the 5th day of November, 1881, Frederick T. M. Wenie, one of the defendants, having settled upon said land subsequently to the entry of plaintiff, made application to the United States land officers at Larned, Kansas, to file an Osage declaratory statement (commonly designated an O. D. S.), under the act of Congress of May 28th, 1880, on the land in controversy with other land, which application was rejected as to the land in controversy for the reason that the said land was embraced in the homestead entry of this plaintiff.

From this decision an appeal was taken by the said Weine to the Hon. Commissioner of the Land Office, and thereafter such proceedings were had that the Hon. Secretary of the Interior Department acquired jurisdiction of the case, and on the 7th day of September, 1885, it was decided by acting Secretary Jenks, of the Interior De-

partment, that "Frost appearing to be an actual *bona fide* settler upon said lots and having offered to make proof and payment therefor in the manner provided by law, I am of the opinion that he should be permitted so to do under and in accordance with the homestead laws of the United States, as required by the said act of December 15, 1880.

"Accordingly, upon his submission of satisfactory proof showing compliance with legal requirements, he will be required to pay, through the proper local land office, the sum of one hundred and ten dollars and eighty-one cents (being at the rate of $1.25 per acre for said lots, aggregating 88.65 acres, as delineated upon the plat approved June 22, 1881), which sum shall be credited on the
3 books of the Treasury to the account of the Osage nation of Indians, agreeably to the aforesaid treaty of 1865."

Afterward, on the — day of ——, 1886, in accordance with the decision last above referred to, the plaintiff, in accordance with the rules and regulations of the Land Office, made final commutation proof, and such proceedings were thereafter had that on the 24th day of July, 1886, the register and receiver of the land office at Garden City (the land being embraced within that district) awarded the land to this plaintiff, from which decision the defendant Frederick T. M. Weine appealed to the Hon. Commissioner of the Land Office; that thereafter such proceedings were had that the Hon. Secretary of the Interior again acquired jurisdiction of the case, and on the 5th day of October, 1887, acting Secretary Muldrow delivered an opinion in said case, which is hereto attached and made a part of this complaint, which decision in effect set aside and held for naught the act of Congress of Dec. 15th, 1880. In that decision the acting Secretary said "That portion of the reservation relinquished by the act of December 15, 1880, which embraced lands ceded by the treaty of 1865 became subject to disposal under the act of May 28, 1880, and that act provides that to entitle a person to purchase said lands he must have the qualifications of a pre-emptor."

"The department may determine, as it did in this case, what may be considered an application to purchase or the initiation of a right, but it cannot dispense with the two requirements of the law, to wit, that the purchaser must be an actual settler and have the qualifications of a pre-emptor." "Frost can make nothing by this decision, because it was made upon an incomplete record; that part of the record *conatinine* Weine's protest and appeal alleging the disqualification of Frost was misplaced in the files of the office
4 and was not transmitted to the Secretary."

"The holding that Frost was entitled to make proof and payment under the homestead laws was presumably based upon the impression that he was a qualified pre-emptor, and therefore entitled to purchase Osage lands."

"I am of opinion that Frost is not qualified to make entry of Osage lands and said entry should be cancelled."

That afterwards the plaintiff filed a motion for a rehearing before the Hon. Secretary, and on the 10th day of Oct., 1888, the for-

mer ruling of acting Secretary Muldrow was sustained and the case closed before the department, resulting in the cancellation of the homestead entry of this plaintiff for the said land. It was further ordered that the Osage declarat-y statement of the defendant Weine for the said land be placed of record by the proper officers of the Garden City land office upon complying with the law relating thereto; that thereupon said Wenie's filing was allowed by the register and receiver of the Garden City land office upon the said land; that afterward, on the 13 day of Feb'y, 1888, the said defendant made final proof of his compliance with the laws and regulations of the Interior Department for the entry of lands under the act of May 28th, 1880; against the allowance of said proof and allowing the said Weine to enter the same this plaintiff protested. Under said protest such proceedings were had that on the — day of Nov., 1889, the Secretary of the Interior having acquired jurisdiction of the case, a decision was made sustaining the cancellation of the homestead entry of this plaintiff and allowing the entry of the defendant, affirming and sustaining the decision of acting Sec. Muldrow of Oct. 5, 1887, to wit, that plaintiff was not qualified to enter land under the pre-emption law; that afterward, on the 25th day of January, 1890, a patent for the said land was duly issued by the United States conveying the title thereto to the defendant Frederic T. M. Weine.

5 That Jessie Weine is the wife of the defendant Frederick T. M. Weine; that said defendants reside upon the said land and occupy the same as a homestead, and for this reason the said Weine is made a party defendant.

Plaintiff further says that at all times during the pendency of the controversy concerning the said land he has used the greatest possible vigilance and the utmost care to protect and preserve his rights to the said land, but that all of his efforts came to naught on account of the persistent misinterpretation of the act of Congress of Dec. 15, 1880, heretofore referred to by the officers of the Interior Department; that there was never any final decision of any officer of said department in reference to said land which decided or held that this plaintiff had not made full compliance with all of the requirements of the homestead laws of the United States; and plaintiff alleges that he did make full compliance with the homestead laws of the United States and the rules and regulations of the Interior Department in reference thereto by residing upon, cultivation, improving said land, and by making proof of all necessary facts in reference thereto and offering to pay for said land as a commuted homestead, but that, disregarding the rights of this plaintiff, the said officers of the Land Department of the United States, while conceding the prior rights of this plaintiff and the fact that he had complied with the homestead laws of the United States in respect to the said land, finally held and decided that this plaintiff was disqualified to make an entry of Osage Indian lands for the reason that he had theretofore exercised his pre-emption right, thereby misconstruing and in effect nullifying the act of

Congress of Dec. 15, 1880, which was during all of said time in full force, except as nullified by said decisions.

Plaintiff further alleges that he is now and at all times has
6 been ready and willing to pay the Government price for the said land, with all the expenses necessarily incident to the making of such an entry, and that he herewith tenders and offers to pay the defendants the Government price for said land, with the necessary expenses for making the said entry, and any further sum that may be adjudged by the court to be just and right; that no tender had been made to defendant for the reason that from the conduct of defendant plaintiff knew such tender would be nugatory. Plaintiff, having exhausted all of his legal remedies in reference to the said land, having no adequate legal remedy and being the equitable owner of the same, brings this his action in a court of equity for the determination of his rights and prays for relief as follows, to wit, that a subpœna — issued against the defendants, Frederick T. M. Weine and Jessie Wenie, to be served in Ford county, Kansas; that the court will take jurisdiction of the said action and properly construe and interpret the said act of December 15, 1880; that the said defendants will be declared to hold the legal title of the said land in trust for this plaintiff; that a proper decree will be entered requiring the said defendants, upon payment of the Government price for the said land and such further reasonable charges as the court may find to be just and right, to convey the said land to this plaintiff, and for such other and further relief as in equity he may be entitled, with his costs in this behalf laid out and expended.

FRANKEY & McGARRY,
Solicitors for Pl'ff.

STATE OF KANSAS, }
County of Ford, } ss:

Daniel M. Frost, the plaintiff in this action, being duly sworn, upon his oath says that he has read the above and foregoing bill of complaint and knows the contents thereof; that the matters and facts therein stated are true, as he verily believes.

7 DANIEL M. FROST.

Subscribed and sworn to before me this 3rd day of Feb'y, 1890.

D. W. MOFFITT,
[SEAL.] *Probate Judge and ex Officio Clerk,*
Ford County, Kansas.

EX. "A."

It wasn't a joke after all.

Last victory and we are still camping on the reservation.

EDITOR REPUBLICAN: Herewith I hand you a copy of the decision by the Secretary of the Interior in the case of Wenie *vs.* Frost. Besides being very good reading to those who are particularly interested, I believe it will also be a source of information to some who

are desirous of becoming familiar with the law regarding the disposal of Osage lands.

F. T. M. WENIE.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Oct.* 5, 1887.

FREDERICK T. M. WENIE
vs.
DANIEL M. FROST. } Osage Lands.

To Commissioner of the General Land Office.

SIR: The tracts involved in this controversy are part of the Osage Indian trust and diminished reserve lands in Kansas, included in what was formerly the Fort Dodge military reservation. By the second section of the treaty of September 29, 1865, between the United States and the tribe of the Great and Little Osage Indians the said tribe ceded to the United States a tract of land twenty miles in width from north to south of the north side of their reser-
8 vation extending its entire length from east to west. By said section the land was declared to be held in trust for said Indians to be surveyed and sold for their benefit by the Secretary of the Interior under such rules and regulations as he may prescribe, and finds of said sales, after deducting the expenses thereof, shall be placed in the Treasury of the United States to the credit of said tribe of Indians for the purposes of this trust.

By executive order of June 22, 1868, the Fort Dodge military reservation was established, which included within its limits part of the lands embraced in said cession.

By act of Congress approved December 15, 1880 (21 Stat., 311), it was provided "that it shall be the duty of the Secretary of the Interior to cause all that portion of the Fort Dodge military reservation in the State of Kansas being and lying north of the land owned and occupied by the Atchison, Topeka & Santa Fé Railroad Company for right of way for its railroad to be surveyed, sectionized, and subdivided as other public lands, and after said survey to offer said lands to actual settlers only under and in accordance with the homestead laws of the United States: Provided that the said Atchison, Topeka & Santa — Railroad Company shall have the right to purchase such portion of said reservation as it may need for its use adjoining that now owned by it, not exceeding one hundred and sixty acres, by paying therefore the price at which the same may be appraised under the direction of the Secretary of the Interior."

That part of the reservation relinquished by this act embraced but a small portion of the Osage lands, the remainder and greater part being lands not subject to the trust created by the treaty of 1865.

Under the act of December 15, 1880, Frost made homestead entry for lots 9, 10, 11, and 12, in section 25, township 26 south,
9 range 25 west, and lots 14 and 15 of section 30, township 26 south, range 24 west, Garden City, Kans., October 1, 1881,

said lots being part of the lands ceded by the treaty of 1865 and embraced in that part of the Fort Dodge military reservation relinquished by the act of December 15, 1880.

October 25, 1881, one Boyd made application to file Osage declaratory statement for the same lots, together with lot six of section 26, township 26 south, range 25 west, and lot 13 of section 30, township 26 south, range 24 west, alleging settlement October 22. November 5, 1881, Wenie made application to file Osage declaratory statement for the same lots applied for by Boyd, alleging settlement November 2, 1881. These applications were made under the act of May, 28, 1880, and were rejected by the register because the tract applied for, except lots 6 and 13, were embraced in Frost's homestead entry.

This case coming before the department on appeal, it was held by decision of September 7, 1885 (4 L. D., 145), that Frost appearing to be an actual *bona fide* settler upon said land, and having offered to make proof and payment for the same, he should be permitted to commute said entry, and the money so paid should be placed to the credit of the Indians, in accordance with the terms of the treaty.

The effect of the decision is to hold that all the portion or the reservation relinquished by the act of December 15, 1880, which embraced lands ceded by the treaty of 1865 should be disposed of under that treaty in the same manner and under the rules and regulations providing for the disposal of Osage Indian lands.

In the decision referred to it was distinctly held that Frost could not acquire title to the land under the provisions of the homestead law because title to land under the law could be acquired by residence without payment, but having made entry conformably to the express language of the act, alleging that he was an actual *bona fide* settler, as required by the act of May 28, 1880, as well as the act of December 15, 1880, treated his entry as an application to purchase, requiring him to pay for said land $1.25 per acre, to be credited to the Osage fund agreeably to the treaty of 1865.

The department construed the act of December 15, 1880, as not intending to abrogate or violate the treaty of 1865, whereby the Indians ceded this land to the United States for the purpose of the trust therein contained.

However we may construe the act of December 15, 1880, with reference to the disposal of the greater part of the reservation relinquished by said act lying north of the Osage lands, it should not be construed as to impair or defeat the rights of the Indians guaranteed by the treaty of 1865.

The establishment of the reservation upon these lands in 1868 did not change or defeat the trust, but simply postpone the execution of it, and when by the act of 1880 a portion of these lands were released from said reservation they immediately became subject to disposal in the manner and under existing laws and regulations providing for the disposal of said lands.

While this appeal was pending before the Secretary, Wenie filed

an application to have said case remanded for trial on questions of fact not appearing in the record then before the department. This application was forwarded through the land office June 6, 1884, to the Commissioner, but was returned to the land office to have service performed, and after such service the application and papers accompanying the same were supposed to have been lost. The application was not before the department when the decision of September 7, 1885, was rendered, and hence the fact therein contained was not passed upon.

It appears, however, that this application was afterwards, to wit, November 12, 1886, transmitted by the present register of
11 the land office to the Commissioner of the General Land Office and is now a part of the record. The facts alleged in said application are substantially as follows:

1st. That Frost did not apply to make said homestead entry at the land office, but that C. A. Morris, register of the land office at the date of said entry, went to Dodge City, sixty miles from the land office, and without giving other notice privately informed Frost that he would take his homestead entry, and application for the same was then and there made before said register.

2nd. That Frost, having theretofore exercised his right of purchase of Osage lands, cannot be legally or equitable entitled to acquire title to another tract of said lands.

Upon the decision of the department of September 7, 1885, Frost on December 9, 1885, offered final proof before the probate judge of Ford county, Kansas, when Wenie and Boyd appeared and filed their joint protest, which embodies the same grounds set forth in the application of Wenie, to have the case remanded for further hearing. The substance of the testimony of Frost upon all questions necessary to the adjudication of this case is as follows: Frost's entry was made before the register at Dodge City and not at the local office; that at the time of filing his application to enter neither he nor his family were settlers upon the tract; that he commenced settlement that day, after making entry, by digging a few holes to indicate where he intended to build his house; that he afterwards established actual residence on the tract and has complied with the requirements of the homestead law. He also testified that he had availed himself of the right of pre-emption in the purchase of Osage lands.

It was also shown by the evidence that C. A. Morris, the register, went to Dodge City for the purpose of appraising the depot
12 grounds of the Atchison, Topeka and Santa Fé railroad, adjoining the tract in dispute; that he brought with him a plat of the depot grounds, and also a plat of the tract in controversy, and that Frost accompanied him over the grounds.

Upon this proof the register and receiver, construing the act of December 15, 1880, as allowing entries upon these lands solely under the homestead laws, and that the term "actual settler" as employed in said act was intended for the benefit and relief of settlers residing upon said lands at the date of the passage of the act, held that Frost has complied with the homestead laws and was qualified to make

homestead entry at the date of entry; that there was no settlement on the land at the date of the act and no proof that Frost did not settle on the tract in October, 1881. They further held that he was not required to commence settlement until six months from date of entry.

Upon the question of fraud and collission between Morris, the register, and Frosy, defendant, they found that Frost must have made and did make his entry at Dodge City from information derived from the plat in the hands of the receiver. They found that this fact did not support said charge.

From this decision Wenie appealed. On February 5, 1887, Boyd filed an affidavit of relinquishment and abandonment of all claim to the lots entered by Frost, to which was appended a copy of his published notice to make final proof for the lot No. 6, township 26, range 25.

On June 27 last you took this case up for consideration, and held that, although Frost had exhausted his right of pre-emption and was not qualified to make entry of Osage land when he made homestead entry of this tract, it did not invalidate said entry, in view of the decision of the department of September 7, 1885, holding that

> Frost was entitled to make proof and payment under and in
> 13 accordance with the homestead laws of the United States,"

and he "appearing to be an actual *bona fide* settler upon said lot and having appeared to make proof and payment therefor in the manner prescribed by law."

As before stated, the sole purpose and scope of the decision was to permit Frost to purchase, he being an actual settler upon the land as required by the act of May 28, 1880. It considered and treated his homestead entry as an application to purchase, but it did not intend to dispense with a qualification that the law expressly provided for nor to pass upon his disqualification when the facts were not then before the department.

That portion of the reservation relinquished by the act of December 15, 1880, which embraced lands ceded by the treaty of 1865 became subject to disposal under the act of May 28, 1880, and that act provides that to entitle*d* a person to purchase said lands he must have the qualifications of a pre-emptor.

The department may determine, as it did in this case, what may be considered an application to purchase or the initiation of the right, but it cannot dispense with the two requirements of the law, to wit, that the purchaser must be an actual settler and have the qualifications of a pre emptor.

Frost can make nothing by this decision, because it was made upon an incomplete record. That part of the record containing Wenie's protest and appeal alleging the disqualifications of Frost was misplaced in the files of the office and was not transmitted to the Secretary. The holding that Frost was entitled to make proof and payment under the homestead laws was presumably based upon the impression that he was a qualified pre-emptor and therefore entitled to purchase Osage lands.

The cause of John H. Roe cited by you in support of your ruling

is not in conflict with this theory. No part of the land embraced in the Fort Kearney reservation was subject to a trust, as in the case of the Osage lands, and hence those lands upon being re-
14 leased from reservation could be disposed of under the homestead laws. The tenor and effect of the decision referred to is to hold that the act of July 21, 1878, releasing those lands from reservation, subjected them to disposal under existing homestead law, providing only for pre-existing settlements in favor of those who prior to June 1, 1876, were actual settlers thereon.

I am of opinion that Frost is not qualified to make entry of Osage lands, and said entry should be canceled. Wenie's application to file will be received, but it is not necessary to pass upon his rights further until he offers to make final proof nor upon Everett's application to intervene, as the issues made in that application can be passed upon when Wenie offers to make final proof.

The papers are herewith returned.

Very respectfully,

(Signed) H. L. MULDROW,
Acting Secretary.

Endorsed: No. 6449. Circuit court U. S. Complaint in equity. Daniel M. Frost, plaintiff, *vs.* Frederick T. M. Wenie *et al.*, defendants. Frankey & McGarry, attorney for plaintiff. Filed Feb. 6, 1890. Geo. F. Sharitt, clerk.

15 *Bond for Costs.*

STATE OF KANSAS, } ss:
County of ——, }

In the Circuit Court of the United States for the District of Kansas.

DANIEL M. FROST, Plaintiff,
vs.
FREDERICK T. M. WENIE and JESSIE WENIE, His Wife, Defendants.

Whereas the above-named plaintiff has this day commenced in the above-named court a civil action against the above-named defendants:

Now, therefore, we, Daniel M. Frost, as principal, and A. J. Anthony and S. Galland, sureties, do hereby bind ourselves, our heirs, executors, and administrators, that the said plaintiff shall pay all costs that may accrue in said action in case he shall be adjudged to pay them, or in case the same cannot be collected from the said defendants, if judgment be obtained against them, that the said plaintiff will pay the costs made by said plaintiff.

On full compliance with the conditions aforesaid this bond shall be void; otherwise in full force.

Witness our hands and seals this third day of February, 1890.

DANIEL M. FROST. [SEAL.]
SAMUEL GALLAND. [SEAL.]
A. J. ANTHONY. [SEAL.]

STATE OF KANSAS, } ss:
County of Ford, }

Samuel Galland and —— —— and —— ——, being first severally sworn according to law, each upon his oath says he owns and possesses property in said county and State over and above all his exemptions, debts, and liabilities under the laws of said State and of the value at least of the sum set opposite to his name in connection herewith.

16

SAMUEL GALLAND. $5,000.00.
A. J. ANTHONY. $3,000.00.

Subscribed and sworn to before me this 3rd day of February, 1890.

D. W. MOFFITT,
Probate Judge and ex Officio Clerk.

NOTE.—The above bond must be signed by one or more sufficient sureties, who must go before some person legally authorized to administer oaths and justify as set forth in the affidavit hereto attached before the same will be approved. See General Statutes 1868, section 723, page 771. (In no case will the bond be approved where the parties do not justify in a sum as much as $100.)

Endorsed: Bond for costs. No. 6440. Daniel M. Frost *vs.* Frederick T. M. Wenie *et al.* Filed Feb'y 6, 1890. Geo. F. Sharitt, clerk.

17

Chancery Subpœna.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

The United States of America to Frederick T. M. Wenie and Jessie Wenie, Greeting:

We command you and every of you that you appear before our judge of our circuit court of the United States of America for the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of March next, to answer the bill of complaint of Daniel M. Frost, this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of To-
[SEAL.] peka, in said district, this sixth day of February, in the year of our Lord one thousand eight hundred and ninety.

GEO. F. SHARITT, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the

above writ is returnable the complaint will be taken against them as confessed and a decree entered accordingly.

GEO. F. SHARITT, *Clerk.*

18 [Endorsed:] No. 6449. Circuit court United States, district of Kansas. Daniel M. Frost *vs.* Frederick T. M. Wenie *et al.* Chancery subpœna. Returnable to rule day, first Monday in March, A. D. 1890. Geo. F. Sharitt, clerk. —— ——, deputy clerk. Filed Feb'y 11, A. D. 1890. Geo. F. Sharitt, clerk. —— ——, deputy clerk. Frankey & McGarry, comp't's sol.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ February 6, 1890, and executed the same as follows, to wit: Served on the within-named defendants, Frederick T. M. Wenie and Jessie Wenie, at Ford county, State & district of Kansas, on the 10th day of February, 1890, by leaving at their usual place of residence in the hands of an adult member of his family named G. W. Clemens a true & certified copy of this writ, with all the endorsements thereon, for each of the above-named defendants.

R. L. WALKER, *Marshal,*
By JAS. McMURRAY, *Deputy.*

Service	4 00
Hotel	2 00
R. R.	16 98
	$22 98

19 In the Circuit Court of the United States in and for the District of Kansas.

DANIEL M. FROST, Pl'ffs,
vs.
FREDERICK T. M. WENIE and JESSIE WENIE, His Wife, Def'ts. } No. 6449.

Come now A. A. Hurd & Robert Dunlap, solicitors for said defendants, and hereby enter the appearance of said defendants in the above suit.

A. A. HURD,
ROBERT DUNLAP,
Solicitors for Def'd'ts.

Endorsed: No. 6449. Circuit court U. S. Dan'l M. Frost, pl'ff, *vs.* F. T. M. Wenie *et al.*, def'd'ts. Appearance. Filed March 3, 1890. Geo. F. Sharitt, clerk.

20 In the Circuit Court of the United States in and for the District of Kansas.

DANIEL M. FROST, Complainant,
vs.
FREDERICK T. M. WENIE and JESSIE WENIE, His Wife, Defendants. } No. 6449.

The joint and several demurrer of Frederick T. M. Wenie and Jessie Wenie, defendants, to the bill of complaint of Daniel M. Frost, the above-named plaintiff.

These defendants, by protestation, not confessing all or any of the matters and things in plaintiff's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, do demur to said bill and, for cause of demurrer, show the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against these defendants or either of them.

Wherefore and for divers other good causes of demurrer appearing in the said bill these defendants do demur thereto and humbly demands the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

ROBERT DUNLAP,
Solicitor for Def'd'ts.

A. A. HURD, *Counsel.*

I, A. A. Hurd, counsel in the above cause, hereby certify that, in my opinion, the above and foregoing demurrer is well founded in point of law.

A. A. HURD.

21 UNITED STATES OF AMERICA, } *ss:*
State of Kansas, County of Shawnee, }

Frederick T. M. Wenie, being first duly sworn, on oath deposes and says that he is one of the above defendants, and that the foregoing demurrer is not interposed for delay.

FREDERICK T. M. WENIE.

Sworn to before me & subscribed in my presence this 1st day of March, A. D. 1890.

[SEAL.] GEO. N. HOLMES,
Notary Public.

My commission expires Dec. 6, 1890.

Endorsed: No. 6449. Circuit court U. S. Dan'l M. Frost, pl'ff, *vs.* F. T. M. Wenie *et al.*, def'ts. Demurrer. Filed March 3, 1890. Geo. F. Sharitt, clerk.

22 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 2nd day of June, 1890, proceedings were had and appear of record in words and figures following, to wit:

MONDAY, *November 10th*, 1890.

DANIEL M. FROST
vs.
FREDERICK T. M. WENIE *et al.* } 6449.

Now comes the plaintiff herein, by Frankey & McGarry, his attorneys, and the defendant, by A. A. Hurd & Rob't Dunlap, their attorneys, and the demurrer of the defendants came on to be heard and was argued by counsel, on consideration whereof the court sustains said demurrer; to which ruling and order of the court the complainant excepts.

23 United States Circuit Court, District of Kansas.

DANIEL M. FROST
versus
F. T. WENIE *et al.*

There seems to be but one question in this case, and that is this: Did the act of Dec. 15th, 1880 (21 Stat., 311), unqualifiedly open the land in controversy to actual settlers under the provisions of the homestead laws? Was such the intent and purpose of said act? If so, the provisions of the homestead laws and the results which follow must be applied to this land.

Under those laws no money consideration is realized for the land unless the homesteader voluntarily chooses to commute his entry into a pre-emption and pay $1.25 per acre and get immediate title to his land. Did Congress intend to give away to actual settlers that portion of the Osage trust lands which come within the limits of the said act, and which had theretofore been reserved as a part of the Fort Dodge military reservation?

The act of Dec., 1880, is broad and general enough, if construed by itself, to justify an affirmative answer to this question, but such construction would be adverse to the terms of the treaty of Sept. 25th, 1865, with the Osage Indians, as well as to the purpose of Congress as indicated by several subsequent acts on the subject of those lands. The act of May 9th, 1872 (17 Stat., 90), reserves the 16th and 36th sections and exposes the balance of these lands to sale for cash only to actual settlers under the general principles of the pre-emption laws. The act of May 28, 1880 (21 Stat., 144), again, after excepting certain portions of the land, offers the remainder to sale to actual settlers, subject to the provisions of the

pre-emption laws. It is likely this act had no application to
24 the Osage lands then reserved for the Fort Dodge military reservation.

It appears that act was not understood by Congress or the General Land Office as placing these particular lands on sale or determining how they should be disposed of, but it indicates the bent of the legislative will on this subject. The act of Dec., 1880, clearly opens these reserved Osage lands for sale.

It seems but a small part of the lands reserved in that act were Osage lands, and, in fixing the general manner of disposing of the lands, it may well be presumed that Congress did not intend to depart from the terms of the treaty and its previously declared purpose in making disposition of the Osage lands. At any rate, before the courts would be justified in reaching such a conclusion such intent of Congress should be clearly indicated by the act itself.

Undoubtedly Congress had the power to subject these lands to the homestead laws, as well as to reserve the 16 and 36th sections, but the Government would be bound under the treaty to pay the Indians $1.25 per acre for lands so reserved and homesteaded.

It could not have been the policy of the Government in disposing of those lands to actual settlers to adopt a plan which would permit one and the same person to obtain one quarter section under the pre-emption laws and another quarter section under the homestead laws. The purpose to permit such traffic and speculation in these lands is nowhere implied in the treaty on the several acts of Congress touching this subject. I am satisfied with the conclusion reached by the General Land Office and the Department of the Interior in this matter. The demurrer to the bill must be sustained.

Endorsed: No. 6449. Opinion. Filed Nov. 10, 1890. Geo. F. Sharitt, clerk.

25 In the Circuit Court of the United States in and for the District of Kansas.

DANIEL M. FROST, Complainant,
vs.
FREDERICK T. M. WENIE and JESSIE WENIE, Defendants.
} In Equity. No. 6449.

Decree.

This cause came on to be heard at this term upon motion of defendants for a decree dismissing complainant's bill; and it appearing that a demurrer to complainant's said bill was sustained at the June term of said court and complainant hath not amended his said bill and does not desire to amend the same, it was thereupon, upon consideration thereof, ordered, adjudged, and decreed that the complainant's said bill of complaint be, and the same hereby is, dismissed, with costs to the defendant, to be taxed.

And thereupon said complainant prayed an appeal to the Supreme

Court, which appeal is granted upon said complainant giving an appeal bond in the sum of two thousand dollars.

C. G. FOSTER, *Judge.*

Endorsed: No. 6449. Circuit court U. S. Daniel M. Frost *vs.* F. T. M. Wenie *et al.* Decree. Filed Nov. 28, 1890. Geo. F. Sharitt, clerk.

26 In the Circuit Court of the United States for the District of Kansas, Sitting at Topeka.

DANIEL M. FROST, Plaintiff,
vs.
FREDERICK T. M. WENIE *et al.*, Defendants. } Affidavit of Value of Property in Controversy.

STATE OF KANSAS, }
Ford County, } *ss:*

Daniel M. Frost & S. Galland, of lawful age, being duly sworn, on their oaths say that they are well acquainted with the real property in controversy in the above-entitled action, to wit, lots 9, 10, 11, & 12, in section 25, township 26 south, range 25 west, and lots 14 and 15 of section 30, township 26 south, range 24 west, located in Ford county, Kansas; and affiants say that the value of said property exceeds the sum of $5,000.00.

DANIEL M. FROST.
S. GALLAND.

Subscribed and sworn to before me this 15 day of Feb., 1891.
[SEAL.] FRANK N. BERRY,
Notary Public.

Com. ex. Jan'y 17, 1891.

Endorsed: No. 6449. Affidavit. Filed Feb. 28, 1891. Geo. F. Sharitt, clerk.

27 In the Circuit Court of the United States for the District of Kansas, Sitting at Topeka.

DANIEL M. FROST, Plaintiff,
vs.
FREDERICK T. M. WENIE *et al.*, Defendants. } Appeal Bond.

Whereas Daniel M. Frost, the above-named plaintiff, has appealed from the judgment rendered against him in the above-styled court to the Supreme Court of the United States, and is required by the law and the court to give security for costs on said appeal in the sum of $2,000.00: Now, therefore, we, the undersigned, hereby bind ourselves in the sum of $2,000.00 for the benefit of the above-named defendants to pay all costs that may accrue in the prosecution of this case on appeal and to pay the judgement heretofore

rendered by this court in this case in the event the plaintiff is adjudged to pay the same.

Witness our hands this 27th day of Feb., 1891.

DANIEL M. FROST.
A. J. ANTHONY.
S. GALLAND.

Approved March 4, '91.
C. G. FOSTER, *Judge.*

STATE OF KANSAS, } ss:
Ford County, }

——— ———, of lawful age, being duly sworn, on their oaths say that they are the identical persons who signed the foregoing cost and appeal bond, and that they are each worth more than $1,000.00 over and above all debts, liabilities, and exemptions.

A. J. ANTHONY.
S. GALLAND.

Subscribed and sworn to before me this 27th day of Feb., 1891.

28 [SEAL.] H. McGARRY,
Notary Public.

My commission expires July 30th, 1893.

Endorsed: No. 6449. Appeal bond. Filed Feb. 28, 1891. Geo. F. Sharitt, clerk.

29 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings in the suit of Daniel M. Frost, complainant, *vs.* Frederick T. M. Wenie and Jessie Wenie, defendant, number 6449, in said court.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 27th day of March, A. D. 1891.

GEO. F. SHARITT, *Clerk.*

Endorsed on cover: Case No. 14649. Kansas C. C. U. S. No. 1176. Daniel M. Frost, appellant, *vs.* Frederick T. M. Wenie and Jessie Wenie, his wife. Filed May 18, 1891.

157-46

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1894.

No. 172.

DANIEL M. FROST, *Appellant.*

vs.

FREDERICK T. M. WEINE and JESSIE WEINE, His Wife, *Appellees.*

Brief and Argument on behalf of Daniel M. Frost. Appellant, on appeal from the Circuit Court of the United States for the District of Kansas.

BY

WM. T. S. CURTIS,
Attorney for Frost.

SAMUEL SHELLABARGER,
A. A HOEHLING, JR.,
Of Counsel.

HERALD PRINT, GARDEN CITY, KANSAS.

IN THE

Supreme Court of the United States.

October Term, 1894.

No. 172.

DANIEL M. FROST, *Appellant.*

vs.

FREDERICK T. M. WEINE and JESSIE WEINE, His Wife, *Appellees.*

Brief and Argument for Appellant.

STATEMENT OF CASE.

The action herein was instituted to determine the question as to the rightful ownership of lots 9, 10, 11 and 12 in Section 25, Township 26 south, of Range 25, and lots 14 and 15 of Section 30, Township 26 south, of Range 24 west, containing 88.65 acres, located in Ford County, Kansas.

The Bill of Complaint filed by Frost prays that the appellees, who hold under a patent from the United States, be decreed to hold the legal title of the land in trust for him and that they be directed to convey the land to him (R 4). A demurrer (R 12) to the bill hav-

ing been sustained and final judgment for the defendant rendered, (R 13-14) an appeal brings the case to this Court (R 15).

I.

The property above mentioned is a part of what is known as the Osage Indian Trust and Reserve lands in Kansas and adjoins the depot ground of the Atchison, Topeka & Santa Fe Railroad at Dodge City, north of the railroad, within the Fort Dodge Military Reservation which was established on the 22d day of June, 1868.

The boundaries of the Indian reserve lands referred to are defined by the treaty with the Osage Indians of September 20th, 1865, (14 Stats., 687).

The first article of this treaty cedes and sells to the United States, absolutely, off of the east end of the tract of Osage lands in Kansas a tract bounded by parallel lines, which was 50 miles long from north to south and 30 miles wide from east to west, but the "western boundary of that cession not to extend further westward than upon a line commencing at a point on the southern boundary of said Osage country one mile east of the place where the Verdigris river crosses the southern boundary of the State of Kansas."

As a consideration of this parallelogram the United States agreed to pay $300,000 by placing it to the credit of the Osage Indians, at interest at 5 per cent., payable to the tribe semi-annually in money, clothing, etc. It provided that the lands should be surveyed and sold under the direction of the Secretary *on the most advantageous terms for cash*, as public lands are surveyed and sold under existing law, "*but no pre-emption claim or homestead settlement shall be recognized.*" No such pro-

vision prohibiting pre-emptions and homesteads is in the second article relating to the Indian Diminished Trust.

The first article further provides that, after reimbursing the United States the cost of the survey and sale, and the said $300,000 placed to the credit of the Indians, the remaining proceeds should be placed in the Treasury to the credit of the "civilization fund and used, under the direction of the Secretary, for education and civilization of Indian tribes residing within the limits of the United States."

The second article is the one which defines said trust reservation. It in substance provides that the Osage cede to the United States a tract 20 miles wide from north to south, off of the north side of the remainder of their present reservation, extending its entire length east and west, and as to this cession the section provides in the following words:

"Which land is to be held in trust for said Indians and to be surveyed and sold for their benefit by the Secretary of the Interior under such rules and regulations as he may from time to time prescribe, under the direction of the Commissioner of the General Land Office, *as other lands are surveyed and sold.* The proceeds of such sales as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of the said tribe of Indians, and the interest thereon at the rate of 5 per centum per annum, shall be expended annually for building houses, purchasing agricultural implements and stock animals, and for the employment of a physician and mechanics, and for providing such other necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances: *Provided*, That 25 per centum of the net proceeds arising from the sale of said trust lands until the said percentage shall amount to the sum of $80,000 shall be placed to the credit of the school fund of the said Indians, and the interest thereon,

at the rate of 5 per centum per annum, shall be expended semi-annually for the boarding, education, and clothing of the children of the said tribe."

II.

The only special acts of Congress (as distinguished from the general land laws) which have application to the present case are the act of the 28th of May, 1880 (21 Stats., 143,) and the act of the 15th of December, 1880 (21 Stats., 311), and the 12th section of the act of the 15th of July, 1870 (16 Stats., 362.)

Said act of the 28th of May, 1880, so far as it affects this case, in substance, provides as follows:

The first section provides that actual settlers *under existing laws* upon the Osage Indian Trust and Diminished Reserve lands should be allowed sixty days after notice to make proof of their settlement, etc., and provides how they should pay for their lands; and that if they failed to, they forfeited their lands and payments actually made.

The second section is the material one in the present case. Its words are:

"That all the said Indian lands remaining unsold and unappropriated, and not embraced in the claims provided for in section 1 of this act, *shall be subject to disposal to actual settlers only, having the qualification of pre-emptors on the public lands.* Such settlers shall make due application to the register, with proof of settlement and qualifications, as aforesaid; and, upon payment of not less than one-fourth of the purchase price, shall be permitted to enter not exceeding a quarter section each, the balance to be placed in three equal installments, with penalties, liabilities, and restrictions as to default and forfeiture as provided in section 1 of this act."

Section 3 provides that, in case default of payment shall continue for ninety days, the lands so in default shall be placed upon a list, and the Secretary was required to cause the same to be proclaimed for and sold *in the manner prescribed for public lands*; not exceeding a quarter-section to one purchaser, at a price not less than the price fixed by law.

Section 6 provides that nothing in the act should be construed to interfere with the operation of townsite laws as applicable to these lands.

Said section 12 of the general appropriation act of the 15th of July, 1870 (16 Stats., 362), is one providing, in substance, that when the Great and Little Osage Indians should agree, in the manner prescribed by the President, to remove, that then the President should remove them from Kansas to lands to be provided for them in the Indian Territory, to consist of as much as 160 acres to each member of the tribe, or to such part of the tribe as said Indians may so desire, to be paid out of sales of their lands in Kansas; the price of the lands to be procured for them in the Indian country not to exceed the price paid by the United States for such lands in the Indian country.

The section further appropriates $50,000 for expenses of removal, etc.; this $50,000 to be reimbursed to the United States from the proceeds of sales of their lands in Kansas, including the Trust lands north of the present Diminished Reserve.

The section then provides that such trust lands north of the present reservation—

"*Shall be open to settlement after survey*, excepting the sixteenth and thirty-sixth sections, which shall be

reserved to the State of Kansas for school purposes, *and shall be sold to actual settlers only, said settlers being heads of families, or over twenty-one years of age, in quantities not exceeding 160 acres in square form, to each settler, at the price of $1.25 per acre: payment to be made in cash within one year from date of settlement or the passage of this act; and the United States, in consideration of the relinquishment by the said Indians of their said lands in Kansas, shall pay annual interest on the amount of money received as proceeds of sale of said lands at the rate of 5 per centum, to be expended by the President for the benefit of the said Indians in such manner as he may deem proper.*"

Said act of the 15th of December, 1880 (21 Stats., 311) is in these words:

"*That it shall be the duty of the Secretary of the Interior to cause* ALL *that portion of the Fort Dodge military reservation, in the state of Kansas, being and lying north of the land owned and occupied by the Atchison, Topeka & Santa Fe Railroad Company for right of way for its road*: (*and to cause the same*) *to be surveyed, sectionized, and sub-divided as other public lands, and after said survey to offer the said lands to actual settlers only* UNDER AND IN ACCORDANCE WITH THE HOMESTEAD LAWS OF THE UNITED STATES: *Provided*, That the said Atchison, Topeka & Santa Fe Railroad Company shall have the right to purchase such portion of said reservation as it may need for its use adjoining that now owned by it, not exceeding 160 acres, by paying therefor the price at which the same may be approved under the direction of the Secretary of the Interior."

These are all the acts of Congress (outside of the general land laws) having any material application to the present controversy.

THE FACTS.

The material facts in the case as disclosed by the pleadings are as follows:—

Daniel M. Frost, the appellant herein, on October 1st, 1881, made, in accordance with the rules and regulations of the land office, a homestead entry for the land in dispute, at the Larned Land District, (now Dodge City). This he professed and aimed to make under the provisions of the said act of Congress of Dec. 15, 1880 (21 Stats. 311). That pursuant to said entry he immediately settled on the land and within six months built a habitable house thereon and moved into the same with his family (R 1). On October 25, 1881, one Frederick W. Boyd filed his pre-emption declaratory statement for the lots applied for by Frost as well as for lot 6 of Section 26, R. 25, W., and for lots 13 of Section 30, T. 26, R. 24, W. This filing by Boyd was professedly under the provisions of said act of May 28, 1880. Subsequently said Boyd relinquished and abandoned all claim to so much thereof as conflicted with the entry made by Frost, and from that time said Boyd has had no connection with said land and reference is made here to his said entry merely for the purpose of explaining his former connection with the controversy as set forth in the opinion of acting Secretary of the Interior Muldrow, which is made an exhibit to the bill of complaint herein (R. 5-9).

On November 5, 1881, 35 days after the entry of Frost, Weine, the appellee herein, filed his pre-emption declar-

atory statement for the same land covered by the prior entry of Frost. He, Weine, professing to do so under the provisions of the Act of May 28, 1880, (21 Stats., 143). This application to file made by Weine, as well as that made by Boyd, was rejected by the local land officers, for the reason that it conflicted with the *prior homestead entry* of Frost. From this action Weine appealed to the Commissioner of the General Land Office, who, having affirmed the action of the local officers, an appeal was taken to the Secretary of the Interior.

On September 7, 1885, acting Secretary Jenks; acting upon said appeal, held in substance (R. 2) "Frost appearing to be an actual *bona fide* settler upon said lots and having offered to make proof and payment therefor in the manner provided by law, I am of the opinion that he should be permitted so to do under and in accordance with the homestead laws of the United States, as required by the said act of December 15, 1880."

Under this decision by the acting Secretary of the 7th of September, 1885, allowing Frost to make proof and complete his entry for the reason that he had complied with the homestead law under his filing of October 1, 1881, he (Frost) on the 9th day of December, 1885, proceeded to make his final proof, and on the 24th of July, 1886, the local officers acted thereon in favor of Frost, whereupon Frost tendered to said officers $110.80 in payment for said land in virtue of his application to commute under Section 2301 of the Revised Statutes, being at the rate of $1.25 per acre.

Weine appealed from this action and on June 17, 1887 the Commissioner of the General Land Office sustained the action of the local officers and dismissed the appeal. A further appeal was then taken by Weine to the Secre-

tary of the Interior and on the 5th of October, 1887, acting Secretary Muldrow reversed the action of the Commissioner and held in substance: That that portion of the said reservation relinquished by the act of December 15, 1880, which embraced lands ceded by the treaty of 1865, became subject to disposal under the act of May 28, 1880 and that act provides that to entitle a person to purchase said lands he must have the qualifications of a *pre-emptor* and further that as Frost had theretofore exercised his rights as a pre-emptor, therefore he was disqualified as such to enter the present land (R. 2).

Thereafter a motion was made on behalf of Frost for review or reconsideration, which motion was denied by the Secretary of the Interior (R. 3).

Thereupon the *homestead* entry of Frost was cancelled and the appellee Weine was permitted to perfect his *pre-emption* filing made on November 5, 1881, and on January 20, 1890, a patent for said land was duly issued by the United States conveying the title thereto to Weine (R. 3).

Upon the issuance of said patent, the legal title to said land having passed out of the United States to Weine, Frost instituted the present suit and the case is now here on his appeal from the decision below sustaining the demurrer to his bill of complaint and from the final decree of said court dismissing said bill of complaint.

ASSIGNMENT OF ERRORS.

The Court below erred:—

(1) In holding that the act of Congress of December 15, 1880 (21 Stats. 311) does not allow entry to be made

of the lands in controversy by the complainant under and in accordance with the homestead laws.

(2) In holding that the said act of December 15, 1880, opens said Osage reserve lands for *sale* under the *pre-emption* laws, and that it does not allow or permit the same to be taken under the *homestead* laws;

(3) In sustaining the demurrer of defendants to the bill of complaint herein for want of equity and in dismissing the said bill of complaint;

(4) In not overruling the said demurrer of defendant; and

(5) Other errors appearing in the record and proceedings had herein.

BRIEF.

It will be perceived, from a scrutiny of the facts of this record and of the statutes affecting the case, that there is in the case but one question of law, and that is whether the filing by Daniel M. Frost, under the act of the 15th of December, 1880, of date October 1, 1881, was valid, notwithstanding such filing was ostensibly made under the homestead laws, as provided in the said act of the 15th of December, 1880, and notwithstanding the further fact that Frost had previously exercised the right to purchase Osage lands.

The Court below in its opinion (R. 13) says: "There seems to be but one question in this case and that is this: Did the act of December 15, 1880, (21 Stats., 311), un-

qualifiedly open the land in controversy to actual settlers under the provisions of the homestead laws?"

It will be perceived by an inspection of the opinion of the Court below (R. 13-14) as well as that of acting Secretary of the Interior Muldrow, made an exhibit to the bill of complaint herein (R. 5-9) that such opinions do not allow any entry of that part of the land within Fort Dodge military reservation lying north of the Atchison, Topeka & Santa Fe Railroad, and which is within said strip of land 20 miles wide covered by article 2 of the treaty of 1865 (and which, as a matter of convenience we will hereafter call the trust land), under the homestead laws, or by parties qualified to make entry under the homestead laws.

And they further held that it was not the intention of the act of the 15th of December to allow any homestead entries of such Osage Lands, because the treaty required them all to be "*sold*," as did also the act of the 28th of May, 1880; and that to give the act of the 15th of December the construction that it permitted homestead entries would be to give it a construction that said trust lands lying north of the railroad should not be "sold" at all, and would, therefore, be to give it a construction which would make said act of December 15, 1880, violate the treaty of 1865, and repeal the act of May 28, 1880.

I

We therefore turn to the direct and controlling legal question in the case, namely, Does the act of the 15th of December, 1880, allow entries to be made of said trust land north of the railroad by any one qualified to make *homestead* entries and "*in accordance with the homestead laws*?"

Said decisions respectively, hold that said act of the

15th of December does not, but only suffers pre-emption entries or other cash sales.

The said act of December 15, 1880, is set forth in full in this brief, *supra*.

The difficulty of presenting the argument showing that these decisions are wrong is really in the fact that the error of the decisions is palpable and self-evident, and such error is incapable of being, by argument, made plainer than it is made by the simple reading of express and unambiguous language of the statute of the 15th of December, which they were construing.

In the Cherokee Tobacco case (11 Wallace, 620) the Court expresses this difficulty in elucidating a self-evident truth precisely as we would express our difficulty here, where the Court says:

"We think it would be like trying to prove a self-evident truth. The effort may confuse and obstruct. It can not enlighten. It never strengthens a pre-existing conviction."

This is truly and exactly a case of which it may be said that it would be impossible to express in the English language more clearly and conclusively the opposite of what these opinions decide, touching the meaning of the act of 15th of December, than is such opposite expressed by the letter of this statute.

Notice what this provision is touching the point *what* lands within Fort Dodge military reservation it was that the act makes it the duty of the Secretary to survey, sectionize, subdivide, and offer to actual settlers only. Secretary Muldrow held that it was so provided only as to a *part* of the lands within Fort Dodge reservation and north of the railroad. But the act is careful to say that the part to be so surveyed and offered was not a *part*, but was to be "ALL" that portion of the reservation north of

the railroad. The decision of Secretary Muldrow holds that the act of the 15th of December meant to require these lands to be disposed of *only* to persons having the qualifications of *pre-emptors*, as required by section 2 of the act of May 28, 1880, (21 Stats., 144); whereas the act, on the other hand, says expressly, peremptorily, and unambiguously that the offer shall be made, not to pre-emptors at all, but "to actual settlers only, under and in accordance with the *homestead* laws of the United States."

And right here observe how solicitous the act is in making it plain that the entries were to be under the homestead laws. The act does not content itself by saying that the offer shall be made "under the homstead laws," but it adds to this word "*under*" the words "*and in accordance with*," so as to make it impossible that the act should be misunderstood in its peremptory requirement that the homestead laws should govern all filings for these lands within this act.

This decision, while seeming purposely to avoid committing the Secretary on the point, yet seems to admit or hold that these Fort Dodge lands north of the railroad, and not within the Osage Trust lands, must, in obedience to said act of the 15th of December, be disposed of under the *homestead* laws only. Thus this decision results in holding that the lands within Fort Dodge reservation and north of the railroad are required by said act of the 15th of December to be divided into two classes, one class, namely, the land within Fort Dodge reservation and north of the railroad, and not within the Osage Trust lands, to be sold exclusively under the *homestead* laws, and that within the Osage Trust lands to be sold under the *pre-emption* laws.

We need not say that such division into these two

classes is the grossest defiance of the umistakable letter of the statute.

This language of the act of the 15th of December is not only clear, unambiguous, and peremptory in requiring "*all*" the lands within the reservation and north of the railroad to be dealt with and disposed of in the *same manner and under the same laws*, but it adds to its clearness unusual *mathematical exactness* in its description of the lands which should be so offered to actual settlers under one and the same system of the homestead laws. It says that the lands to be so offered must be "*all*" of the lands within boundaries which the act itself gives on every side, and gives with unmistakable exactness. This is so because the boundaries called for are fixed with mathematical certainty on the public records of the Land Department. The boundaries of the land so to be "offered under and in accordance with the homestead laws" were to be bounded on all sides except on the south side by the boundaries of the Fort Dodge reservation, and on the south side it is required to be bounded by the "land owned and occupied by the Atchison, Topeka & Santa Fe Railroad Company for right of way for its railroad." That south boundary is not only notorious and fixed by the visible monument furnished by existence of the railroad, but is fixed by exact surveys and maps recorded in the land records of the Department.

The decision by Secretary Muldrow is one which says that you shall *not* bound the lands so to be "offered under the homestead laws" on the south side by the railroad, as the act says it shall be, but you shall bound it on the south by the north line of said trust lands.

Now, this is an undisguised attempt to repeal the act of Congress and substitute in the place of it an act passed by the Secretary. The language attempted to be ex-

punged is, as already remarked, absolutely incapable of being misunderstood.

The opinion below and that by the Secretary, hardly disguises the fact that it is in the teeth of and defies the letter of the act of the 15th of December; and the reason given for this defiance of the plain words of the statutes is that they will not construe the statute as intended to violate the treaty obligations contained in article 2 of the treaty of 1865, which requires, they say, the lands to be "sold."

We will presently come to the point that our construction, which validates the Frost entry, is not one which makes the statute of 15th of December to be violative of the treaty.

But for the purposes of the point *now* under consideration, to wit, the authority to so disregard and defy the peremptory requirements of this statute, it is not here necessary to go into the question whether or not our construction of the act of the 15th of December is violative of the treaty, because our point now is that whether it violates the treaty or not, whether it repeals the treaty and act of the 28th of May or not, are questions into which the Secretary and the court below had no right to inquire as against the unmistakable letter of this statute.

The words of a *plain* statute must control those who administer it, *and this without regard to the consequences;* and consequences of a construction can never be looked to where the language being construed is unambiguous, as we have seen it is in this case.

Now, although the legal proposition just stated is extremely elementary and thoroughly settled, yet we feel required to enter upon a careful citation of authorities touching the point, because this elementary and settled rule of the law has, as we submit, been disregarded in

the decisions in the case at bar, both in the court below and in the Department of the Interior.

Take now the following authorities. First take from section 4, page 6, of "Endlich on the Interpretation of Statutes," (edition of 1888) the following:

"When, indeed, the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise, and those incidental rules which are mere aids to be invoked when the meaning is clouded are not to be regarded."

Citing Western Union Tel. Co. *vs.* District of Columbia, 2 Central Reporter, 694.

"Such language best declares, without more, the intention of the lawgiver, and is decisive of it."

Citing U. S. *vs* Hartwell, 6 Wallace, 395.
U. S. *vs.* Wiltberger, 5 Wheaton, 95.

Continuing said section 4, Endlich says:

"The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction."

To this is cited

Rex *vs.* Banbury, 1 Adol. & Ellis, 142.
Fisher *vs.* Bright, 2 Cranch, 399.
Case against Wallbridge, 4 Indiana, 451.

Returning again to said section 4, it proceeds:

"It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they may suppose to have been the real intention of the lawmakers."

To this is cited

Newell *vs.* People, 7 New York, 97.
Barstow *vs.* Smith, Walker's Rep. (Mich.) 394.
Bidwell *vs.* Whitaker; 1 Mich., 469.
McCluskey *vs.* Cromwell, 11 New York, 593.

The author proceeds:

"Where the words of a statute are plainly expressive of an intent not rendered dubious by the context, the interpretation must conform to and carry out that intent. *It matters not in such a case what the consequences may be.*"

To this point, that it matters not what the consequences may be, the author cites a great multitude of cases in note 23, among which are:

2 Mass., 475.
54 New York, 226–262.
3 Mass., 221 and 523.
7 Mass., 306.
11 Pickering, 490, etc.

Take, as a specimen of the decisions here recited, the case of Putnam *vs.* Longley, 11 Pickering, 490, where the language of the court is:

"But where the language is clear, and where, of course, the intent is manifest, the court is not at liberty to be governed by considerations of inconvenience."

Returning again to said section 4, the author proceeds:

"It has, therefore, been distinctly stated *from early times down to the present day* that judges are not to mould the language of the statutes in order to meet an alleged *inconvenience or an* alleged equity; are not to be influenced by any notions of hardship, or of what in their view is right and reasonable or is prejudicial to society; *are not to alter clear words*, though the Legislature may not have contemplated the consequences of using them; are not to *tamper with words* for the purpose of giving them a construction which is supposed to be more consonant with justice than their ordinary meaning."

This last language from said section 4 is quoted from Wilberforce on Statute Law, page 116.

Section 4 proceeds:

"Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, *even though it be absurd or mischievous.*"

To this is cited in note *a* the English cases, very numerous.

Section 4 proceeds:

"If the words go beyond what was probably the intention, *effect must nevertheless be given to them.*"

To this in note *b* is cited the English case of Nolle *vs.* Buck, 8 Barnwell and Cresswell, 164.

Section 4 proceeds:

"They cannot be construed contrary to their meaning, as embracing or excluding cases, merely because no good reason appears why they should be excluded or embraced."

Citing, among others, Denn *vs.* Reed, 10 Peters, 524.

This case of Denn *vs.* Reed is one where the Court, in deciding the case, admitted that the meaning expressed by the words in the statute leads to unreasonable results; but the court said:

"But where the language of the act is *explicit, there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the Legislature.* Where the language of the act is not clear, and is of doubtful construction, the court may well look at every part of the statute. * * *But it is not for the court to say, where the language of*

the statute is clear, that it shall be so construed as to embrace cases because no good reason can be assigned why they were excluded from its provisions."

Returning again to said section 4, the author proceeds:

"However unjust, arbitrary, or inconvenient the intention conveyed may be, *it must receive its full effect.*"

To this is cited in note *b* (page 8) the English cases, very numerous.

Section 4 further proceeds as follows:

"Indeed, it is said that it is only when all other means of ascertaing the legislative intent fail that the courts may look to the *effects of a law in order to influence their construction.*"

Citing Dudley *vs.* Reynolds, 1 Kansas, 285.

Section 5, page 8 of the same work (Endlich) says:

"What is called the 'policy' of the Government, with reference to any particular legislation, is said to be too unstable a foundation for the construction of a statute;"

Citing Haddon *vs.* Collector, 5 Wallace, 107.

Section 5 proceeds:

"The clear language of a statute can neither be restrained nor extended by any consideration of *supposed wisdom or policy.* So long as the legislative enactment violates no constitutional provision or principle, it must be *deemed its own sufficient and conclusive* evidence of the justice, propriety and policy of its passage. The language of Mr. Justice Story concerning constitutional construction applies clearly to statutes. He says: 'Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare *ita lex scripta est*, to follow and to obey.'"

In section 6, page 9; the same author proceeds:

"It has been said that, though vested rights are divested, those who have to interpret the law must give effect to it. And they are bound to do this even when they suspect (on conjectural grounds only) that the language does not fairly express what was the real intention of the Legislature when it passed the act, or would have been its intention if the specific case had been proposed to it. Even when a court is *convinced that the Legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.* 'It may have been an oversight in the framers of the act,' says Parke, B., 'in one case, but we must construe it according to its obvious meaning.' *Though the consequences should be to defeat the object of the act, a construction not supported by the language of it can not be imposed by the court in order to effect what it may suppose to be the intention of the Legislature.* 'Our decision,' says Lord Tenterden; 'may, in this particular case, *operate to defeat the object of the act; but it is better to abide by its consequences than to put upon it a construction not warranted by the words of the act, in order to give effect to what may be supposed to have been the intention of the Legislature.* *A fortiori*, where a statute, in language clear, positive and direct, and leading to no absurdity, gives a suitable remedy for an existing evil, though an inadequate one, a construction which, *upon the ground of a supposed intention of the Legislature* to give a more effectual one, would undertake to enlarge the terms of the act would be unwarranted."

In section 7, page 10, the author proceeds:

"In short, when the words of an act admit of but one meaning, a court is not at liberty to *speculate on the intention of the Legislature, or to construe the act according to its own notions of what ought to have been enacted.* Nothing can be more *dangerous* than to make such considerations the ground of construing an enactment that

is quite complete and unambiguous in itself. *The moment we depart from the plain words of the statute according to their ordinary and grammatical meaning, and hunt for some construction founded on the general policy of the law, we find ourselves involved in a 'sea of trouble;' difficulties and contradictions meet us at every turn. Indeed to depart from the meaning on account of such views is, in truth, not to consider an act, but to alter it.* But the business of the interpreter is not to improve the statute; it is to expound it. While he is to seek for the intention of the Legislature, that intention is not to be ascertained at the expense of the clear meaning of the words. The question for him is not what the Legislature meant, but what its language means."

To each one of the foregoing propositions the author cites abundant judicial authority from nearly all of our States and from England.

We now turn to some further specimens of these judicial decisions, establishing the same propositions we have quoted from the text-book. And in turning to these cases we first take, for obvious reasons, the decisions of this court on this subject.

The first case to which we refer happens to be, in its legal aspects, almost identical with the case we now consider, namely, whether the plain and unmistakable words of a statute may be construed away because the construing authority thinks the plain words are violative of a treaty; and whether, moreover, where such statute contains no exception to its leading requirement, as, for example, in the present case, no exception to the requirement that "all" that part of Fort Dodge north of the railroad and within the Osage Trust lands should be "offered under and in accordance to the homestead laws," any such exception could be by the construing authority engrafted upon the statute itself by way of intendment.

This case we now refer to is the Cherokee Tobacco Case (11 Wallace, 616-620, *et seq.*) In that case a ques

tion of construction arose as between an act of Congress and the tenth article of the treaty between the Cherokees and the United States, of July 19, 1866. (14 Stats., 801.)

This treaty provided, among other things, that the Cherokees should have the right to sell *any* merchandise or manufactured products, and to ship and drive the same to market without restraint.

The one hundred and seventh section of the act of July 20, 1868 (15 Stats., 167), provided that the internal-revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars shall be held and construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not.

The position there taken regarding the construction of this section 107 was precisely as in the present case, that although the language of section 107 was broad and general, and made the revenue tax applicable to "articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not," yet because that giving this section 107 this broad construction made it violate said article 10 of the treaty of 1866, therefore the court should engraft upon section 107 an exception exempting the Cherokees from the tax, although the section contained no such exception.

So precisely in the present case the contention is that because to offer "*all*" land within Fort Dodge reservation lying north of the railroad would violate the treaty of 1865, therefore the Government authority shall engraft upon the words "all that portion of Fort Dodge military reservation being and lying north of" the railroad the exception which shall say that you shall not offer "all" the lands north of the railroad, but only all lands so

lying north, except such as come within the Osage Trust lands.

It was in regard to this contention that this Court used the following language in repudiating such contention. Speaking of the provisions of said section 107, extending the tax to articles produced anywhere within the exterior boundaries of the United States, the court says (11 Wallace, 620):

"The language of the section *is as clear and explicit* as can be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exception had been intended, it would doubtless have been expressed. *There being no ambiguity, there is no room for construction. It would be out of place.* (*U. S. vs. Wiltberger*, 5 Wheaton, 95.) *The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning ad inconvenienti is of no avail.* It is the duty of the courts to execute it. (Nierhous *vs.* Rennel, 1 Clark & Finley, 527; Wolf *vs.* Coppel, 2 Denio, 372.) Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure, but can not enlighten. It never strengthens the pre-existing conviction."

The court then proceeds to say that said section 107 does conflict with said article 10 of the treaty and repeals it.

This case has been reaffirmed or recognized probably a score of times by this Court.

The great leading case upon the point that where words of a statute are plain no construction is permitted, and the words must be implicitly followed according to their meaning, without regard to the consequences of so

following them, is the case of United States *vs.* Wiltberger, 5 Wheaton, 95.

The opinion is by Chief-Justice Marshall. He says, on this point:

"The intention of the Legislature is to be collected from the *words they employ.* Where there is no ambiguity in the words, *there is no room for construction*."

In the case of Lessee of French *vs.* Spencer, 21 Howard, 228, the contention was set up that the land warrants provided to be issued to Canadian soldiers who joined our armies in the war of 1812 by the act of March 5, 1816 (3 Stats., 225), should not be delivered to such soldiers, as the act plainly required, but such delivery should be governed by the provisions of certain other laws of 1811–1812, which require the location of the warrants to be by and at the expense of the Government, and that they should not be delivered to the soldiers.

In repudiating this contention the court says:

"The act of Congress orders the warrants to be delivered to the respective owners, to be located by them, whereas the common soldier provided for in the acts of 1811–1812 did not receive his warrant, but the Government bound itself to locate the land at its own expense. Congress may have thought it not at all necessary to guard the Canadian volunteers against being overreached by speculators and deprived of their bounty lands. This, however, is mere conjecture. The act of March 5, 1816, has no reference to or necessary connection with any other bounty-land act; it is plain on its face and single in its purpose. And, then, what is the rule—one that can not be departed from without assuming on the part of the judicial tribunal legislative power? It is that where the Legislature makes a plain provision *without making any exception*, the courts can make none. (McIver *vs.* Reagain, 2 Wheaton, 25; Patten *vs.* McClure, Martin & Yerger Tenn. Rep., 345, and cases cited; Cook

& Jack *vs.* McGinnis, *Ib.*, 366; Smith *vs.* Troop, 20 Johnson, 33.)"

In the case of Texas *vs.* Chiles, 21 Wallace, 488, 491, the question was raised whether section 858 of the Revised Statutes, enacting that in the courts of the United States, no witness shall be excluded because he is a party or interested, had not the effect of merely giving a privilege to each party to testify, which may be availed of as a matter of choice, without conferring the right upon either party to compel the other to testify. The court held that giving the statute this construction would be to depart from its plain meaning and engraft upon it an exception not contained in the words. And the court says:

"The case is one where the language is so clear and comprehensive that there is no room for construction, and the duty of the court is simply to give it effect according to the plain import of the words. There should be no construction where there is nothing to construe."

Citing 5 Wheaton, 76.

In the case of Lewis, Trustee, *vs.* U. S., (92 U. S., 618-621), a contention was set up to the effect that the bankrupt act of the 2d of March, 1867, which gives "priority or preference" in payment, first to payment of taxes, etc., and, second, "all debts due to the United States and all taxes and assessments under the laws thereof."

There it was contended that certain classes of persons were not liable to be subjected to this priority in favor of the United States.

In repudiating this contention the court says (page 621):

"Where the language of a statute is transparent and its meaning clear, there is no room for the office of construction. There should be no construction where there

is nothing to construe. (5 Wheaton, 95; 11 Wallace, 621.)

"That the facts disclosed in the record bring the case within the plain terms and meaning of the section in question seems to us, viewing the subject from our standpoint, almost too clear to admit of serious controversy. Affirmative discussion under such circumstances is not unlike argument in support of a self-evident truth. The logic may mislead or confuse. It cannot strengthen the pre-existing conviction."

Some of these cases from this Court, being on all fours with the present case, ought to be conclusive of the radical error of said opinion below and in the Department of the Interior.

But by way of abundant caution, we now turn to a few of the immense body of cases sustaining the propositions which we have quoted from Endlich.

Take, for example, the case of Rosenplaenter *vs.* Roessle *et al.*, 54 N. Y., 262, which was an action for losses by a guest at a hotel against the inn-keeper, the loss having been by breaking open the guest's door and trunk and stealing articles of jewelry therefrom.

The inn-keeper claimed exemption under a statute which provided, in substance, that if the inn-keeper provided a safe for keeping money and jewels, etc., and posted a notice thereof in the rooms occupied by the guest, and the guest neglected to deposit the articles lost in the safe, the innkeeper is not liable. The statute made no exceptions allowing the guest to retain money or articles in ordinary use or needed for travel, and it was there held by the Court that the omission of the guest to so deposit said articles was a neglect within the meaning of the statute, and the innkeeper having complied with the act, was exempted from liability for their loss.

The case of Guild *vs.* Libbey, (36 Barber, 70,) had held that this statutory exemption, or a similar statutory exemption, of the inkeeper did not apply to all money, jewels, and ornaments, but only to such as the innkeeper himself would, if a prudent man, have put into the safe when retiring at night. It was insisted that it was unreasonable to suppose that the Legislature intended to require the guest, when he retired, to deposit such reasonable amount of money as he required for the day's expenses, or the jewels and ornaments in hourly and constant use, and that the statutory exemption did not apply to the watch and chain, gold pencil, etc., which were stolen.

This case of Guild *vs.* Libbey was overruled in Hyatt *vs.* Taylor, 51 Barber; 632, and in Hyatt *vs.* Taylor; 42 N. Y., 258.

The case of Rosenplaenter approves unqualifiedly the opinion and law as laid down in the case of Hyatt *vs.* Taylor, and that case of Hyatt *vs.* Taylor states the rule which prohibits the courts from engrafting conditions and exceptions upon a plain statute which has no such conditions, in the following words (42 N. Y., 260):

"The Legislature is the sole judge of the question of discretion. Whether it is wise or reasonable to modify the common-law responsibility of inkeepers by permitting them to take into their actual custody in the place of their safe deposit all money, jewelry, and ornaments for the safety of which the guest desired to hold them liable rests purely upon the legislative estimate of what public policy and a regard for their protection against the contingencies of loss requires."

The opinion, after stating the absurdity and inconvenience of requiring all money to be deposited in the safe, proceeds to say regarding the effect of such inconvenience upon the construction of the statute:

"Such considerations, although they very properly aid in the interpretation of a statute expressed in terms of possible double meaning or of ambiguous import, or uncertain in their designation of the subjects to which they apply, have *no influence in determining the legal effect of a statute free from any such obscurity.*"

The court, therefore, held, both in the case of Hyatt *vs.* Taylor (42 N. Y., 258) and of Rosenplaenter *vs.* Roessle (54 N. Y., 262,) that the courts could engraft *no* exception upon these statutes which contain no exception protecting the innkeeper from liability.

In Woodbury & Co. *vs.* Berry (18 Ohio State Rep., 461) it was sought to engraft upon section 455 of the Ohio code a condition, which was not in the section, dispensing with a certain fifteen day's notice to a sheriff before he could be amerced. In refusing to engraft such a condition on the section the court, while admitting that it was absurd to require fifteen days' notice to be served upon the sheriff in the class of cases where the writ issued from a county *other than his own*, and require that no such notice should be given where the writ was issued in his own county, proceeds to overrule this contention in the following words:

"These considerations, and a comparison of the provisions of these sections of the statute as they stand with those of the statute which was superseded and repealed by the code of civil procedure, not only suggest the conjecture, but convince us of the fact, that the words 'other than the county,' or some equivalent phrase, must have been, by accident or oversight of the draughtsman of the bill to establish a code of civil procedure, or of the clerk who engrossed it, omitted before the words 'from which the execution issued' in section 455. But, notwithstanding all this *ita lex scripta est.* The language as it stands is clear, explicit, and unequivocal. It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied by considerations outside of

the language that the Legislature intended to enact something very different from what it did enact. But it did not carry out its intention, and we cannot take the will for the deed. It is our legitimate function to interpret legislation, but not to supply its omissions.

"'When the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences of evil can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action. Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction.'" (Sedgwick on the Statutory and Constitutional Law, 231.)

"Courts 'must not, *even in order to give effect to what they may suppose to be the intention of the Legislature, put upon the provisions of a statute a construction not supported by the words, even although the consequences should be to defeat the object of the act.*' (Smith's Commentaries on Statutory Construction, section 714.)"

The opinion of the Court below in this case (R 13-14) expressly admits what we have herein insisted upon, namely, that Congress has the power to open up this land for entry under the *homestead* laws; but the Act (Dec. 15, 1880) by which Congress has expressly declared these lands open to entry under the homestead laws, is, by the Court sought to be evaded by resort to the examination of prior acts and treaty to find out what the *intention* of Congress must have been, and when such examination is had the decision is reached that Congress could not have *intended* to open up these lands to the citizen for entry under the *homestead* law, and that when Congress used the word *homestead* it did not mean that but meant something else, to-wit: pre-emption or sale.

As we have above abundantly shown such decision by the Court is nothing more nor less than judicial legislation and is entirely unwarranted.

It would be obviously improper for us to further extend this citation of authorities, because if what have been cited should be held to be insufficient to establish the error in the opinions of Secretary Muldrow and that of the court below, then no possible amount of citation, however appropriate and conclusive, will have that effect.

What we have now established (if authorities can establish anything)—to the effect that the plain and unambiguous words of a statute must be followed by those called upon to administer it, without regard to consequences—has been said upon the assumption that our construction of the act of the 15th of December results in violating or repealing article 11 of the treaty of 1865, and in being violative of the trust obligations established by said article.

DOES THE ACT OF DECEMBER 15, 1880 ALLOWING HOMESTEAD ENTRY VIOLATE SAID TREATY OF 1865.

I.

We now turn to the consideration of the question whether our interpretation of said statute of the 15th of December, holding that it authorized Frost's homestead entry, is an interpretation which in the bad sense of that word "violates" said treaty or the trust obligation created by said article 2.

As bearing upon this whole case, and also upon the present point as to how far the statute of December 15, 1880 really "violates" said treaty, we inquire at the outset what is the nature of the Indian possessory interest or titles in the public lands, such as their interest in these trust lands, and what are the power, obligation and duty of the Government of the United States regarding them?

This subject is so fully gone over and adjudicated in the recent case of Buttz *vs.* Railroad Company, 119 U. S. 56, 66, 67, *et seq.*, as to make it unnecessary for us to refer to other cases than said case of Buttz and those therein cited. That case arose upon the interpretation of the Act of Congress of the 2d of July, 1864, granting to the Northern Pacific Railroad lands which were covered by the possessory titles of the Indians and the Court was there brought to the question whether such occupation and the possessory titles created by treaties with the Indians excluded such lands from said grant, and the further question of what powers Congress held over such lands.

The Osage Trust interest in the present case is one not essentially different from the Indian title secured by treaty dealt with in this Buttz decision.

Upon the general subject of the nature of the Indian title and the powers of Congress regarding such lands the Court says:

"At the time the act of the 2nd of July, 1864, was passed, the title of the Indian tribes was not extinguished, *but that fact did not prevent the grant of Congress from operating to pass the fee of the land to the Company.* The fee was in the United States. The Indians had merely a right of occupancy—a right to use the lands *subject to the dominion and control of the Government.*"

So equally in the present case are the said Indian Trust lands; lands of which the *fee is in the United States* and they are "*subject to the dominion and control of the Government.*"

The Court proceeds:

"The grant conveyed the *fee* subject to this right of occupancy. The railroad company took the property with

these incumbrances. The right of the Indians, it is true, can not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time and condition of its extinguishment were matters solely for the consideration of the Government, and *are not open to contestation in judicial tribunals.* As we said in Beecher *vs.* Witherbee, 95 U. S. 517-525, it is to be *presumed* that in this matter the United States *would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.* Be that as it may, *the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derived title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government.'* In support of this doctrine several authorities were stated in that case."

The court then proceeds to analyze the case of Johnson *vs.* Macintosh (8 Wheaton, 543-575), where the opinion was by Chief-Justice Marshall, and derives from that case the same doctrines just quoted from Beecher *vs.* Witherbee (*supra*). So also of the case of Clark *vs.* Smith (13 Peters, 201), in which the same doctrine is announced. The gist of this case is in the following proposition of the syllabus:

"The grant by the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company of lands to which the Indian title had not been extinguished operated to convey the *fee* to the company, subject to the right of occupancy by the Indians.

"The manner, time, and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the Government and can not be interfered with nor put in contest by private parties."

Stated in our own language, the result of these cases is this: That as to all lands where the Indian right of

occupancy, whether secured by treaty or otherwise, exists, the fee in the lands is in the United States the same as other public lands. The right of the Indians is a *usufruct*, and nothing more. The lands are, as between the United States and all others, a part of the public lands. The right and power of the Government to dispose of them as public lands is absolute and unqualified. And such right of disposition and such disposition by Congress cannot be put into contest or litigation either in the Executive Departments or in the courts, the law of Congress upon the subject being a soverign political act not coming within the judicial contestation, and the remedy of the Indians for any alleged violation of treaty rights growing out of said act is to be found, as expressed in Buttz *vs.* Railroad (119 U. S., 66) in the "justice of Congress," because "it is to be *presumed* that in this matter the United States would be governed by such considerations of *justice* as would control a Christian people in their treatment of an ignorant and dependent race." Be that as it may, the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties neither of whom derives title from the Indians.

The bearing of this proposition just stated upon the present case, is obvious and important, and is this: That the trust obligations assumed by the Government toward the Indians touching this 20-mile strip is *political* as distinguished from *justiceable;* and when the second article of the treaty of 1865 imposed and created this trust it did not take the trust lands out of the category of strictly United States lands. But while this is true, yet Congress, in such disposition, comes under the obligation to the Indians which is so often expressed in paragraphs

like the one just quoted, where the Government's obligation, resulting from such disposal of the trust lands according to its own pleasure, results in creating an obligation toward the Indians upon the Government as to which it "will be *presumed* by all administering the laws that in this matter the United States will be governed by such considerations of *justice* as would control a Christian people in their treatment of an ignorant and dependent race."

Hence in this view, no "violation," in any bad sense, of treaty obligations toward the Indians is involved in disposing of this land under the *homestead laws*, if Congress chooses so to do. Such disposition under the homestead laws where no sale is made or money realized *does* result in imposing upon Congress the duty to make good to the Indians the value of these lands as if they were disposed of by actual sales; for example, under the pre-emption laws.

II.

Another consideration going to show that this trust land was received as public land under said second article of the treaty of 1865, and was to be disposed of as public land, is found in the provision of the treaty itself. It will be observed that as to the 50-mile strip covered by article 1 of that treaty it was carefully and expressly provided that "no pre-emption claim or homestead settlement should be recognized."

And it will be further observed that article 2, in providing for the sale of this trust land, *contains no such prohibition against pre-emptions or homesteads.* These features of the treaty, taken in connection with the express provision in that article 2 which says that this trust land should be "surveyed and sold for their benefit by the Sec-

retary of the Interior, under such rules and regulations as he may from time to time prescribe, under the direction of the Commissioner of the General Land Office *as other lands are surveyed and sold*," shows that disposition under the homestead laws is not prohibited by the treaty.

Now, it is palpable that public lands disposed of by commutation under section 2301 of the homestead laws are "sold" lands within the sense of the word *sale* as used in said article 2.

We therefore submit, in view of the fact that all lands in which the United States has the fee simple, though subject to Indian titles, are always at the *absolute and unqualified* disposal of the United States, and that in making such disposition according to its sovereign pleasure the United States never violates treaty obligations securing Indian possessory or Indian trust titles, but does incur obligations to compensate for any Indian rights so disposed of; that in this case the presence of the provision in the first article of the treaty of 1865 forbidding preemption entries on the 50-mile strip, and the absence of such a provision as to the 20-mile strip, and the presence of the provision in said article 2 saying that the United States shall "survey and sell them as other public lands are sold," established the point that selling or disposing of these lands under the homestead laws is no violation of the treaty of 1865 in any sense involving bad faith.

We further submit that if a homestead entry, under the act of December 15, were consummated without commutation and payment of money; still that would be lawful, and would result in the obligation on the part of the United States to pay to the Indian Trust Fund at least the minimum, $1.25 per acre, payable under pre-emption entries.

It is to be further observed that the fact that the Indians were entitled to receive pay for said lands from the United States in no way prevents the United States from making such disposition of said lands as it might deem proper. The Indians would be equitably entitled to receive from the United States $1.25 per acre, and the United States would be, to that extent accountable to the Indians for the lands thus taken. But can it be said that $1.25 per acre is compensation to the United States for allowing a portion of its public lands to remain unsettled and uninhabited; and if the United States saw fit to hold out as an inducement to its citizens to settle upon, cultivate and improve this part of its domain, these lands for entry under the *homestead* laws, and to itself assume the liability to account to the Indians therefor, it was, as we submit, and as the court below admits, perfectly competent for Congress so to legislate, and that is exactly what was meant to be accomplished by the passage of the act of December 15, 1880.

III.

Again, another consideration leading to the same conclusion that this trust land was, under said treaty, received with the understanding that Congress might dispose of it as it might please without violating any treaty is furnished by the provisions of section 12 of said appropriation act of the 15th of July, 1870. (16 Stats., 362.) Said section 12 expressly provides for not selling but reserving to the State of Kansas, for school purposes, sections 16 and 36. And this is by said section 12 expressly made applicable to said trust lands.

Now, was this reservation of school sections a violation of the trust?

If it was not, then how shall it be said that permitting the three trust sections, within Fort Dodge reservation

north of the railroad to be taken up by homesteaders under the act of December 15th, 1880, and paid for by Congress, is violative of the treaty when said reservation to Kansas of the school sections unsold and not provided to be paid for, is not a violation of the treaty?

There is no provision in this act of July 15, 1870, for paying for said sections 16 and 36. That payment is, of course, contemplated to be made in virtue of the considerations of justice "which control a Christian people in their treatment of an ignorant and dependent race."

And this view of the matter derived from said exemption from sale, by said section 12 of the act of 1870, of sections 16 and 36, is sustained by the judgment of the court in the case of Baker *vs.* Newland, (25 Kansas Rep. 25). The opinion is by Mr. Justice Brewer. What the case decides is expressed in the syllabus in the following words:

"Osage ceded lands—Certain sections granted for schools.—The joint resolution of Congress of date April 10, 1869, in respect to the disposition of the lands ceded by the Osage Indians to the Government by the treaty of September 29, 1865 which provided 'that the sixteenth and thirty-sixth sections in each township of said land shall be reserved for State school purposes, in accordance with the provisions of the act of admission of the State of Kansas,' operated as a grant of said sections to the state for school purposes.

"Such grant was NOT IN VIOLATION OF THE TERMS OF THE TRUST UPON WHICH SAID LANDS WERE CEDED TO THE GOVERNMENT; and even if it were, the title of the grantee would not thereby fail, *although the Indians might have an equitable claim upon the Government for compensation on account of its breach of trust.*"

This decision in the case of Baker *vs.* Newland, if followed by this Court is, and must be decisive of the case at bar, because the same involved the consideration and

determination of the exact questions raised on behalf of the defendants in this case, and said decision was against the contention so urged.

This decision is also important and useful in the consideration of the present case, because it was based upon the construction of the identical treaty and the same legislation by Congress as are involved in the present case.

What we have now said regarding the proposition that allowing these trust lands to be taken up under the homestead law is no violation of the treaty is abundantly sufficient to establish that proposition.

But whether it be sufficient or not is rather immaterial in the present case, because of the fact, already stated, that all public lands, owned in fee by the United States and subject to Indian titles are subject to the *absolute* disposition of Congress, and neither departments nor courts can question that disposition where it is expressed in plain terms, as is done by this act of the 15th of December.

It is immaterial whether the act of December 15 violates the treaty or not, for the further reason that if it *does* violate the treaty and repeals it, the law is, in that case and view, *equally* and absolutely binding upon the courts and the departments, and must be administered according to its plain terms, precisely as if it did not violate the treaty.

This proposition of law is, of course, equally with the others which we have stated, settled and not open to question.

This subject is carefully and fully gone over and decided in the Cherokee Tobacco case. (11 Wallace, 616, *et seq.*, cited *supra.*) In that case the party resisting the tax made the contention, precisely as it is made in this

case, that the tax law violated the Cherokee treaty. The court said it did violate the treaty, but that it *repealed* it also, and that no court or department had any right to question the wisdom or policy of that repeal, but must execute the law precisely as they found it.

The case of Edye *vs.* Robertson, 112, U. S., 580, 597, 598, (commonly known as "the Head Money Cases,") again takes up this subject and reaffirms the Cherokee Tobacco Case unanimously, and cites the case of U S. *vs.* McGratney, 104 U. S. 623, 624; also the case of Taylor *vs.* Morton, 2 Curtis, 454; also the case of Ah Lung, 18 Federal Reporter, 28, and other cases, and holds that treaties generally are subject to repeal by Congress, and that they depend for their enforcement "on the honor and interests of the governments which are parties to it, and that, if these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them; and that, with this securement of rights, resulting from infraction of treaties, the judicial courts and, of course, the Executive Departments have nothing to do."

What we have gone over surely establishes the main proposition in this case, namely, that the act of December 15, being clear, explicit, peremptory, and unambiguous in its terms regarding the trust land north of the railroad and within Fort Dodge reservation, and expressly requiring this "ALL" to be sectionized, surveyed, and offered UNDER AND ACCORDING TO THE HOMESTEAD LAWS OF THE UNITED STATES, must be executed according to its unmistakable words; that the intention of Congress cannot be searched for or conjectured, in violation of the plain words of the act; that this would be true even if the act of Congress was in conflict with the provisions of the second article of the treaty of 1865; that the said provision

requiring the trust lands within Fort Dodge reservation and north of the railroad to be offered under and in accordance with the homestead laws is not violative of the treaty. And therefore, *a fortiori*; must the plain words of the act requiring the lands to be disposed of "under and according to the homestead laws" be strictly adhered to.

This being so, and since it is unquestionable that one who has once exercised a pre-emption right is not thereby prohibited from exercising a homestead right and commuting under section 2301 (as held in the case of James Brittin (4 L. D. 441), and also the case of Ball *vs.* Graham (6 L. D. 407), wherein the Brittin case is cited with approval), it follows that the entry of Frost of October 1, 1881, was, to all intents and purposes, valid under the said law of December 15, 1880, and that the action of the Department of the Interior in thereafter cancelling the said homestead entry of Frost so made under the act of December 15, 1880, and in permitting the defendant Weine to complete his pre-emption filing made under the act of May 28, 1880 for said land and in issuing patent therefor to said Weine, was and is erroneous and in violation of the rights of Frost.

DEFENDANT HOLDS THE LAND IN DISPUTE AS TRUSTEE FOR COMPLAINANT.

If we are right in our contention that the act of December 15, 1880, did open up the lands in controversy under the provisions of the *homestead laws*, then, of course, it must result that the construction put upon that act by the Secretary of the Interior was erroneous, and that under a proper construction of that act patent for the lands in controversy should have been issued to the complainant Frost, and when thereafter, because of its erroneous construction of said act of December 15, 1880,

it issued its patent for the land in dispute to the defendant Weine, said defendant became and was, in equity, trustee of said title for the benefit of Frost.

It has been repeatedly decided by this Court that, under this state of facts resort may be had to the courts to decree such holder of title to the public lands, so erroneously patented, to be a *trustee* for the party legally entitled thereto.

Take, for example, the leading case of *Johnson vs. Towsley* (13 Wall. 72), where the syllabus accurately states what was decided in the following words:

"After the title has passed from the government to individuals, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

"In deciding this question, if it appears that the party claiming the equity has established his right to the land to the satisfaction of the land department in the true construction of the acts of Congress, but that, by an erroneous construction, the patent has been issued to another, the court will correct the mistake."

This case has been by this Court repeatedly reaffirmed.

In view of all the foregoing considerations, it is respectfully submitted that the Court below erred in sustaining the demurrer of the defendant, to the bill of complaint herein, and that the same should have been overruled.

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Attorney for Frost.

SAMUEL SHELLABARGER,
A. A. HOEHLING, JR.,
Of Counsel.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 172.

DANIEL M. FROST, Appellant,

vs.

FREDERICK T. M. WENIE and JESSIE WENIE, His Wife, Appellees.

BRIEF FOR APPELLEES.

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Judd & Detweiler, Printers, Washington, D. C.

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BRIEF FOR APPELLEES.

Statement.

Frost filed his bill of complaint in this cause in the circuit court of the United States for the district of Kansas February 6, 1890. He claims therein to be possessed of the equitable title to lots 9, 10, 11, and 12, in section 25, township 26 south, range 25 west, and lots 14 and 15, in section 30, township 26 south, range 24 west, situated in Ford county, Kansas, and prays that the defendants, who hold the legal title to said lots under and by virtue of a patent from the United States issued January 25, 1890, to Frederick T. M. Wenie, be declared to hold such title as trustees for his (Frost's)

benefit, and that they be decreed to convey said lands to him. (Rec., pp. 1–4.)

To this bill, on March 3, 1890, the defendants demurred for the reason that "said bill doth not contain any matter of equity whereon this (circuit) court can ground any decree" for the relief prayed. (Rec., p. 12.)

Upon hearing, the court—C. G. Foster, judge—sustained the demurrer (Rec., p. 13), and, the complainant electing to stand upon the bill as filed, a final decree dismissing the same was entered November 28, 1890. (Rec., p. 14.)

From this decree, on the same day, an appeal was prayed in open court, which appeal brings the case here for review.

FACTS.

The pertinent facts alleged by the bill and admitted by the demurrer are as follows:

The lands involved in this controversy are a part of the Osage Indian trust and diminished reserve lands and were at some time included in the Fort Dodge military reservation. (Rec., p. 5.)

On October 1, 1881, Frost, assuming that the lots had been restored to the public domain by virtue of the act of December 15, 1880, "authorizing the Secretary of the Interior to dispose of a part of the Fort Dodge military reservation to actual settlers," filed a homestead entry covering the same and *afterwards* settled upon and built for himself a habitable house thereon. (Rec., pp. 1–5.)

November 5, 1881, Frederick T. M. Wenie, having also established his residence upon the lands, offered to file an Osage declaratory statement therefor under the act of May 28, 1880, entitled "An act for the relief of settlers upon the Osage trust and diminished reserve lands in Kansas."

This offer was rejected by the register of the local land office because of conflict with the prior entry of Frost, already of record. (Rec., pp. 1–6.)

Thereafter such proceedings were had pursuant to law and under the rules and regulations of the General Land Office that the Secretary of the Interior (Mr. Vilas) acquired jurisdiction of the parties and of the controversy, and, after a full hearing had been had in the premises, he, on October 5, 1888, rendered a decision against Frost and in favor of Wenie (Rec., pp. 5–9; 6 Land Decisions, p. 539), the effect of which decision was that (1) the lands were not subject to entry under the act of December 15, 1880, and (2) that Frost, having already availed himself of his right to purchase Osage lands, no longer possessed the qualifications of a pre-emptor and should not therefore be permitted to make further entry.

On motions for review filed in the Interior Department this decision was twice reaffirmed

(1) By Secretary Vilas, in 6 Land Decisions, 539.
(2) By Secretary Noble, in 9 Land Decisions, 588.

In each of these decisions the principles involved in the controversy before the department are amply argued and the conclusions reached, with the reasons therefor, clearly stated.

TREATIES AND STATUTES.

By the second article of the treaty of June 2, 1825, with the Great and Little Osage tribes of Indians (7 Stats. L., 240) a reservation was established in what is now the southern portion of the State of Kansas for the use and benefit of said Indians "so long as they may choose to occupy the same."

By a subsequent treaty concluded with said Indians September 29, 1865, and proclaimed September 21, 1867 (14 Stats. L., pp. 687–693), the boundaries of the original reservation were much reduced, the Indians, by section one (1) thereof, in consideration of $300,000 cash to be placed to their credit in the Treasury of the United States and interest thereon at the rate of 5 per centum per annum, to be paid to them semi-annually, ceding to the Government a strip of lands in extent fifty (50) miles from north to south and thirty (30) miles from east to west, said lands to be surveyed and sold for cash "as public lands are surveyed and sold under existing laws, but no pre-emption claim or homestead settlement shall be recognized," the proceeds from such sales "after reimbursing the United States the cost of said survey and sale and the said sum of three hundred thousand dollars * * * to be placed in the Treasury of the United States to the credit of the 'civilization-fund.'"

By article 2 of said treaty the Indians ceded a further strip of lands—

"Twenty miles in width from north to south off the north side of the remainder of their reservation and extending its entire length from east to west, which land is to be held in trust for said Indians and to be surveyed and sold for their benefit (*by the Secretary of the Interior under such rules and regulations as he may from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold*), **under the direction of the Commissioner of the General Land Office, at a price not less than one dollar and twenty-five cents per acre, as other lands are surveyed and sold, under such rules and regulations as the Secretary of the Interior shall from time to time prescribe; Amendment, 14 Stats., pp. 692, 693**. The proceeds of such sales as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians, and the interest thereon, at the rate of five per centum per annum, shall be

expended annually for building houses, purchasing agricultural implements and stock animals, and for the employment of a physician and mechanics and for providing such other necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances: *Provided*, That twenty-five per centum of the net proceeds arising from the sale of said trust lands, until said percentage shall amount to the sum of eighty thousand dollars, shall be placed to the credit of the school fund of said Indians; and the interest thereon, at the rate of five per centum per annum, shall be expended semi-annually for the boarding, clothing, and education of the children of said tribe."

By act of January 9, 1837 (5 Stats., 135), entitled "An act to regulate in certain cases the disposition of the proceeds of lands ceded by Indian tribes to the United States," it was provided in substance that all moneys thereafter received from the sale of lands theretofore or thereafter ceded to the United States by Indians, under treaties directing either the payment to them of the proceeds of such sales or the investment of such proceeds for their benefit, should be paid into the Treasury of the United States in the same manner that moneys received from the sales of public lands are paid into the Treasury, to be withdrawn therefrom, as required, as other public moneys are drawn therefrom, "under such instructions as may from time to time be given by the President."

By section 12 of the act of July 22, 1854, entitled "An act to establish the offices of the surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes" (10 Stats. L., 308, 310), it was enacted:

"That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas shall be subject to the operations of the *pre-*

emption act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned."

The act of June 2, 1862, "An act to establish a land office in Colorado Territory, and for other purposes (12 Stats. L., 413), declared "that *all* lands belonging to the United States to which the Indian title has been or shall be extinguished shall be subject to the operations of the *pre-emption* act of September 4, 1841, and under the conditions, restrictions, and stipulations therein mentioned."

As the act of May 20, 1862, "An act to secure homesteads to actual settlers on the public domain" (12 Stats. L., 392), provided that title to all lands subject to pre-emption entry might be acquired by "homesteaders" *without the payment of cash therefor*, Congress, upon the ratification of the treaty of 1865–1867 above outlined, resorted to special legislation for the purpose of fulfilling the treaty stipulations in that regard.

This special legislation will be found in the following joint resolutions and statutes:

(1.) Joint resolution of April 10, 1869, "a resolution enabling *bona fide* settlers to purchase certain lands acquired from the Great and Little Osage Indian tribes" (16 Stats. L., 55), providing (*a*) that any *bona fide* settler residing upon any portion of the lands sold to the United States "by virtue of the first and second articles of the treaty" of 1865–1867, who is a citizen of the United States or who has declared his intention to become such, should be entitled to purchase within two years from date *not exceeding 160 acres*, at the price of $1.25 per acre, (*b*) both odd and even sections to be subject to such settlement and sale, but (*c*) the sixteenth and thirty-sixth sections to be reserved for State school purposes.

(2.) Act of July 15, 1870, "An act making appropriations for the current and contingent expenses of the Indian Department," etc. (16 Stats., L. 335), sec. 12, p. 362, providing for the removal of the Great and Little Osage Indians whenever they "shall agree thereto" from their lands in Kansas to lands to be provided for them in the Indian Territory, said lands "to be paid for out of the proceeds of the sales of their lands in the State of Kansas," and to defray the expenses of such removal appropriating the sum of $50,000, "to be reimbursed to the United States from the proceeds of the sale of the lands of the said Indians in Kansas, including the trust lands north of their present diminished reservation, which lands shall be open to settlement after survey, excepting the sixteenth and thirty-sixth sections, which shall be reserved to the State of Kansas for school purposes, and shall be sold to *actual settlers* only, * * * in quantities not exceeding 160 acres in square form to each settler, at the price of $1.25 per acre, payment to be made in cash within one year from date of settlement or of the passage of this act."

(3.) Act of May 9, 1872, "An act for the relief of settlers on the Osage lands in the State of Kansas" (17 Stats. L., 90), providing that Osage Indian trust and diminished reserve lands in Kansas, except the sixteenth and thirty-sixth sections in each township, shall be subject to disposal *for cash only* to actual settlers, not exceeding 160 acres in compact form, "in accordance with the general principles of the preemption laws: *Provided*, That claimants shall file their declaratory statements as prescribed in other cases upon unoffered lands, and shall pay for the tracts settled upon within one year from date of settlement" where township plat is on file.

Actual settlers upon these lands who had failed to pay for the lands settled upon by them under the act of July 15, 1870 (*supra*), were granted three months within which to file

declaratory statements and were required to "prove up" before January 1, 1873, and upon the amount paid by such settlers interest at the rate of 5 per cent. was to be collected as from the date when they should have made payment under the act of July 15, 1870.

(4.) Act of June 23, 1874, "An act to extend the time for completing entries of Osage Indian lands in Kansas" (18 Stats. L., 283), which extended the time within which actual settlers on Osage lands should make proof and payment one year from date and re-enacted the clause in preceding act requiring the payment of interest at the rate of 5 per cent. on payments which under former statutes were in default and required all occupants to file applications to purchase the lands occupied by them within three months from date.

(5.) Act of August 11, 1876, "An act providing for the sale of Osage ceded lands in Kansas to actual settlers" (19 Stats. L., 127), declaring that *bona fide* settlers on Osage lands, citizens of the United States, shall be entitled to purchase the land resided upon by them, not exceeding 160 acres, at $1.25 per acre, one-fourth of the purchase price to be paid at the time of making entry and the balance in three annual payments, drawing (bearing) interest at the rate of 5 per centum per annum and secured by notes of the purchaser, payable to the United States, the Secretary of the Interior to withhold title until the last payment has been made, when patent was to be issued.

(6.) Act of May 28, 1880, "An act for the relief of settlers upon the Osage trust and diminished reserve lands in Kansas, and for other purposes" (21 Stats. L., 143), providing, sec. 1, that actual settlers under existing laws upon the Osage lands (any failure to comply with such existing laws notwithstanding) shall be allowed sixty days after date, fixed

by a public notice to be given, within which to make proof of their claims, and to pay one-fourth of the purchase price thereof, the balance to be paid in three annual installments, and in case of default the lands to be sold as thereinafter provided.

SEC. 2. "That all the said Indian lands remaining unsold and unappropiated and not embraced in the claims provided for in section one of this act, shall be subject to disposal to actual settlers only, having the qualifications of pre-emptors on the public lands, such settlers shall make due application to the register with proof of settlement and qualifications as aforesaid; and, upon payment of not less than one-fourth the purchase price shall be permitted to enter not exceeding one quarter section each, the balance to be paid in three equal installments, with like penalties, liabilities and restrictions as to default and forfeiture as provided in section one of this act."

SEC. 3. "All lands upon which such default has continued for ninety days shall be placed upon a list, and the Secretary of the Interior shall cause the same to be duly proclaimed for sale in the manner prescribed for the offering of the public lands * * * but such lands * * * SHALL BE SOLD FOR CASH to the highest bidder at not less than the price fixed by law, * * * and if any of said lands shall remain unsold after the offering as aforesaid, they shall be subject to private entry FOR CASH in tracts not exceeding one quarter section by one purchaser."

(7.) Act of June 16, 1880, "An act to carry into effect the second and sixteenth articles of the treaty between the United States and the Great and Little Osage Indians, proclaimed January 21, 1867" (21 Stats. L., 291), which recites that by the act for the admission of the State of Kansas into the Union, approved January 29, 1861, the United States granted to said State the sixteenth and thirty-sixth sections of every township of public lands in said State, provided that lands within Indian reservations in said

State "should not be alienated for any purpose except with the consent of the Indians of such reservations and in accordance with the conditions of the treaty authorizing such alienation," and also that by the treaty with the Osage Indians proclaimed January 21, 1867, "a trust was created for the disposal of the lands of said Indians in the State of Kansas * * * by which the United States bound itself to survey and sell any and all of such lands 'at a price not less than $1.25 per acre, as other lands are surveyed and sold,' and to place 'the proceeds of such lands as they accrue after deducting all expenses incident to the proper execution of the trust * * * in the Treasury of the United States to the credit of said tribe of Indians,'" and

"Whereas, it is claimed that under the operation of the treaty herein referred to there are moneys due, * * * which have not been placed to the credit of said Indians, as provided for in said treaty; therefore

Be it enacted, etc., That the Secretary of the Interior is hereby authorized and directed to cause an account to be stated of the number of acres of the Osage lands in the State of Kansas that have in any way been alienated by the United States, either by the act of January twenty-ninth, eighteen hundred and sixty-one, entitled 'An act for the admission of Kansas into the Union (12 Stats. L., 126),' or since the creation of the trust for the sale of these lands by the treaty * * * proclaimed January twenty-first, eighteen hundred and sixty-seven, and of the money received by the United States on account of the sales of such lands, and to certify the difference between the sum so received and the sum that would be due said trust at the date of the account herein provided for had all said lands so alienated been disposed of as provided for by said treaty.

SEC. 2. That a sum of money equal to the amount certified by the Secretary of the Interior, in pursuance of the foregoing section, to the Secretary of the Treasury, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, which the Secretary of the Treasury is directed to place to the credit of the Secretary of the Interior,

as custodian of said trust funds, and, after defraying the cost of survey and sale of said lands and other expenses contracted by the United States or the Osage nation in the execution of said trust, the balance of said funds shall be placed in the Treasury of the United States, to the credit of said Indians, to be invested and distributed in accordance with existing treaties: *Provided*, That a like settlement shall be made with the Indian-civilization fund for the sixteenth and thirty-sixth sections, given by the United States to the State of Kansas, within the limits of the Osage lands ceded by the first article of the treaty aforesaid."

Thus stood the special legislation with reference to "Osage lands" at the dates when Frost made his homestead entry and Wenie offered to file his Osage declaratory statement for the lots above described.

FORT DODGE MILITARY RESERVATION.

By general order No. 17, headquarters Department of Missouri, bearing date May 29, 1868, the Fort Dodge military reservation was established on the 22d day of June, 1868. Its southern boundary line, as so established, was the Arkansas river, and it overlapped the northern boundary line of the Osage trust and diminished reserve lands, [redacted] by the lands ceded by article 1 of the treaty of 1865–1867.

By the Act of December 15, 1880, entitled "An act to authorize the Secretary of the Interior to dispose of a part of the Fort Dodge military reservation to actual settlers under the provisions of the homestead laws, and for other purposes" (21 Stats. L., 311), it was made the "duty of the Secretary of the Interior to cause all that portion of the Fort Dodge military reservation in the State of Kansas, being and lying north of the land owned and occupied by the Atchison, Topeka and Santa Fé Railroad Company for right of way for its railroad, *and to cause the same* to be surveyed, sectionized, and subdivided as other public lands, and after

said survey to offer said lands to actual settlers only under and in accordance with the homestead laws of the United States."

The lots here in controversy are within the overlapping limits of the Osage trust and diminished reserve lands and of the Fort Dodge military reservation. They also lie north of the "land owned and occupied by the Atchison, Topeka and Santa Fé Railroad Company for right of way for its railroad."

Frost claims the equitable title thereto by virtue of having made a *homestead* entry therefor under the provisions of the act of December 15, 1880 (*supra*), which entry has been canceled by order of the Secretary of the Interior. Wenie is in possession of said lots under a patent issued upon his Osage pre-emption entry made pursuant to section 2 of the act of May, 1880 *supra*.

ARGUMENT.

It being admitted that prior to October, 1881, Frost had availed himself of his right of pre-emption in the purchase of Osage lands (Rec., p. 7), it follows that he was not qualified to make a second entry therefor (statutes relating to Osage lands, *supra*, and Exhibit "A," Rec., p. 9, affirmed on motion for review in 9 Land Decisions, p. 588), unless the act of December 15, 1880, making it the "duty of the Secretary of the Interior to cause *all* that portion of the Fort Dodge military reservation * * * north of the land occupied by the * * * railroad company for right of way for its road to be surveyed * * * and to offer the said lands to actual settlers only, under and in accordance with the homestead laws of the United States," is applicable to this case.

It is well said that the controlling and, perhaps, the only question of law involved in this case is as to the right of homestead settlers to enter Osage trust lands within the limits of the abandoned military reservation and lying north of the railroad track under the provisions of the act of December 15, 1880, *supra*. In other words, was it the intention of Congress by that act to permit the disposal of these "trust lands" to settlers without requiring such settlers to pay therefor the cash value which, by the treaty with the Osage Indians, the United States had agreed to collect and retain or expend for their benefit under the terms of the trust specifically expressed?

Are the many acts pertaining to the disposal of these trust lands and hereinbefore noted so flatly contradicted by the act of December 15, 1880, as to be utterly irreconcilable therewith and so directly in conflict that the latter act must be construed as a repeal of the former?

That a statute is not repealed by a later affirmative statute which contains no repealing clause, unless the conflict between them is irreconcilable, is well settled.

Red Rock *vs.* Henry, 106 U. S., 596.

A repeal by implication is not favored. The leaning of the court is against the doctrine, if it be possible, to reconcile the two acts.

McCool *v.* Smith, 1 Black, 459.

At the outset, then, we admit the *power* of Congress not only to repeal statutes such as those pertaining to Osage trust lands, but also to repeal the provisions of a treaty which no longer receives or merits its endorsement.

"The Cherokee Tobacco Case," 11 Wall., 616.

The question here is not as to the *power* of Congress to violate the treaty provisions, but has it done so either expressly or by necessary implication?

The elemental principle that statutes expressed in clear and unambiguous terms are not subject to construction by courts has no application where two or more statutes, neither one of which is expressly repealed, appear by their terms to affect the same object in conflicting manners.

In such a case—

"The question for the courts is: What did the legislature really intend to direct? And this intention must be sought in the whole of the act taken together and other acts *in pari materia*. If the language be plain, unambiguous, *and uncontrollable by other parts of the act or other acts or laws upon the same subject* the courts cannot give it a different meaning to subserve public policy or to maintain its constitutionality."

Sutherland, Statutory Construction, p. 316.

Mere literal construction ought not to prevail if it be opposed to the intention of the legislature as manifested in other subsisting acts.

General words do not always extend to every case which literally falls within them (Jeffreys *vs.* Boosey, 4 H. L., 815), and a statute must be construed with reference to the whole system of which it forms a part, for it is common learning that *the letter* and *the meaning* of a statute are not always convertible terms.

The general terms of a later statute will be restricted where, by prior laws, subjects naturally falling within such general terms have been classified and made subject to distinct and dissimilar regulations (Sutherland, p. 370, § 284), for where there is no express repeal none is presumed to have been intended, and the effect of a new statute in conjunction with other statutes, with reference to established systems and policies, is always in view.

(*Ibid.*, p. 405, § 321.)

The expression "any person" in a later statute will be construed to harmonize with an earlier statute which re-

quired *for the purpose* the possession of certain qualifications by *the person*.

Tobacco-pipe Makers *vs.* Woodroffe, 7 B. & C., 838.

And a thing may well be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers.

Rector, etc., of Holy Trinity Church *vs.* United States, 143 U. S., 457.

And in this connection statutes upon cognate subjects, though not strictly *in pari materia*, may be referred to for the purpose of ascertaining the exact intent of the legislature.

Smith *vs.* People, 47 N. Y., 330.
Whitcomb *vs.* Rood, 20 Vt., 49.

In the case before us, however, the treaty of 1865–1867 and the act of May 28, 1880, are both *in pari materia* with any provisions in the statute of December 15, 1880, that may *appear* to act upon the *Osage Indian lands*, and the "unmistakable letter" of this latter statute can be ascertained only by considering the "letter" of all three. In effect *the three* constitute *one* statute, so that "the four corners" of each include the provisions of all.

The meaning of *the sixteen lines* of the act of December 15, 1880, is not therefore to be ascertained, as many pages of the brief in behalf of appellants intimate, by confining attention within those lines.

We submit (1) that upon the reason of the thing the act of December, 1880, does not operate upon any land which is the subject-matter of that of May preceding, and (2) that the highest courts, both in cases settling general principles and in others which cover the very features here presented, maintain the same view.

1. The act of May 28, 1880, had been introduced in the House of Representatives on the 16th of June, 1879, or within fifteen days of the end (July 1) of the first session of that Congress. It passed Congress upon the 20th day of May, 1880—that is, within a month of the last day (June 16) of the second session. The act of December 15, 1880, had been introduced upon the 7th of January, during such second session, and passed Congress upon the 8th of December, 1880—that is, upon the third day of the third session of that term; in other words, the two acts were matured substantially during the same session and contemporaneously, and the latter was passed within thirty *legislative* days after the former. They were both introduced by the same gentleman (Mr. Ryan, of Kansas), *and were enacted, as regards the present topic, just as they were introduced.*

It is admitted that all of these circumstances together, viz., introduction by the same person, maturation at the same session, and enactment as introduced, within a few days of each other, do not insure against conflict in their provisions, and also that in case of such conflict those of the former statute must give way. This *history* is given only as affording some *a priori* presumption that they do not conflict.

This presumption is carried farther by scrutinizing *the letter* of both statutes.

The phrase "public lands" is one perfectly well understood by the legislature and the judiciary as meaning such lands as are subject to sale or other disposition under *general* laws (Newhall *vs.* Sanger, 92 U. S., 761). It therefore does not include Indian lands ordered to be sold for the benefit of the Indians, but does include lands of a military reservation that has been abolished with directions to extend thereto the general system of survey and disposal in whole or in part.

Accordingly the *second* section of the act of May 28, 1880, provides that the pre-emptors thereby entitled shall

have the qualifications of pre-emptors on "the public lands" [*not* "*other* public lands";] and the *third* section uses the same phrase in describing the manner of proclaiming "defaults;" and the *fifth*, in defining the fees of registers," etc. On the contrary, the act of December 15, 1880, having occasion to define the manner in which the land therein included shall be surveyed, provides that this shall be the same as that of "*other* public lands." The phrase "*other* public lands" in the latter statute indicates that the land included in that statute is not Indian trust land; just as the phrase "the public land" in the former conforms to the other provisions therein that show that it applies only to land which is *not* "public land." If the lands in the act of December, 1880, are to be treated as "*other* public lands," they must themselves be public lands, and this indicates that if within the tract *bounded* by the words of that act are found certain lands by law affected with a trust on behalf of Indians or others, these, not being "public lands," are not within its purview.

This conclusion arises, as will be seen, from a consideration of only the *sixteen lines* of the act itself. It is true that the matter relied upon for the distinction is not a large one, but no *ear-mark* is.

The use above of the familiar technical term "public lands" (about as notable in land legislation as "heirs" is at common law) puts its readers, and, much more, those who administer it, *upon inquiry;* which, if properly carried out, will show that by the provisions of the act of May preceding and of the treaty of 1865 there are within those bounds land affected by a treaty, and therefore not intended to be disposed of thereby.

It is instructive to note in this connection that the treaty of 1865, whose words must have been under the eye of Congress whilst these statutes were pending as bills, exhibits like accuracy in providing that certain surveys and sales of lands ceded by Indians in trust shall be done (art. 1)

"as public lands" are, or (art. 2) "as other lands" are, omitting, *ex industria*, the word *other* in the former connection, and *public* in the latter.

That Congress, during the pendency of the bills in question, was alive to the duties of the United States as trustee of the Osage lands is also shown by its action in amending the earlier bill (see section 7 of the act of May, 1880), so as to require settlers *to pay interest* upon deferred payments. The reason of this amendment is easily *implied* from the effect assigned (May 20, 1880) by Senator Edmunds in moving therefor, viz: "Of course, under the treaty our duty to the Indians, where this property is thus extended and sold on time and payment deferred, would require us in the execution of the trust, *to make interest*, as anybody else would, for the benefit of the Indians." It seems difficult to believe that a body thus penetrated by a sense of duty as trustee for these Indians, even as against certain settlers whom Congress was then engaged in relieving, because of hardships occasioned by drought, etc., could at the same time have intended, by a then pending bill, to disregard the same treaty obligations in the interest of a class of persons not only unentitled to any exercise of special grace, but even entirely unknown.

It is to be repeated that no issue is made here as to the *power* of Congress in the teeth of any treaty or law whatever to give away as homesteads or otherwise any or all Indian lands within its domain. The question which divides the parties is whether stipulations about lands contained in Indian treaties and other agreements do not confer such, *at least*, *quasi* rights as to so distinguish the lands thereby affected that a statute which would plainly dispose of such land if not affected does not dispose of them if they be.

The cavalier disregard for Indian rights under treaties, etc., expressed in the brief of our learned opponents, receives

scant countenance in the long series of cases involving such rights contained in the Supreme Court reports, a series ending with the late *Choctaw* case, 119 U. S., 1; the opinion in which is so saturated with the effect of that series as to make it difficult to select a passage therefrom in which the governing principle is specially asserted.

Leavenworth R. R. Co. *vs.* United States, 92 U. S., 733 (a sort of twin to the noted case of Newhall *vs.* Sanger, *ibid.*, 761, which succeeds it), is cited by us as being a counterpart to the present case. There it appeared that the United States had by act of March 3, 1863, granted to Kansas to aid in the construction of railroads, etc., certain odd-numbered sections of land on each side of a road thereafter to be located; that in 1868 a map of the plaintiff's road had been filed, and that in 1871 the governor of the State had certified certain sections as coming within that grant, which sections thereupon were conveyed to the State, and by it to the plaintiff. By treaty of June 2, 1825, the United States had secured to the Osages possession and use of their land, which included that in question, so long as they might choose to occupy the same. Under the twelfth article of the treaty of 1865–1867, the land covered by the odd-numbered sections in question had been ceded to the United States in trust to be conveyed and sold for certain purposes which concerned the Indians.

The court held that the act of 1863 did not dispose of the land secured to the Indians by the treaty of 1825, notwithstanding its subsequent abandonment and cession as above. And this for two independent reasons: (1) and principally, that the statutory grant to the State for the road could not fairly be construed to include lands which by previous treaty the United States had secured to the Indians, and (2) that an express reservation in the grant was to the same purpose.

Three of the judges dissented from both views, and two

of these dissented also from Newhall *vs.* Sanger. But both cases have subsequently been often cited by the court and have become landmarks of the law.

In the Leavenworth case, therefore, the court held that words in a statute making donation of "every" article of a certain sort did not include articles of that sort with regard to which, *by treaty*, long previous, the United States had contracted certain duties to Indians incompatible with the purpose of such statute.

The distinction between the *original* Indian right of occupancy and such right to specific tracts expressly *secured by treaty* is illustrated by the case of Buttz *vs.* Railroad, 119 U. S., 66, cited in the brief upon the other side, where the decision was against the immunity claimed for Indian land held by *original* title of occupancy.

Indeed the doctrines of strict construction applicable to *donations* by the United States of the class referred to by the court in the Leavenworth case are much more applicable to disposals for homesteads (as here); and there are other features in that case which make its conclusions applicable *a fortiori* as between the acts of May and December, 1880.

The case of Red Rock *vs.* Henry, 106 U. S., 596, is also instructive in this connection. There the State of Minnesota, by an act of 1868, had authorized *each town* in the county of *Mower* and five others, acting by a majority of the voters, to issue bonds to aid in constructing railroads in either or all of such counties; and thereupon certain steps had been taken by the town of Red Rock, in Mower county, to exercise that authority, which steps, however, were short of creating a contract. Whilst things were so an act of 1870 authorized *each town* in *Mower* and two other counties (not named in the act of 1868), acting by

votes of a majority of the supervisors ratified by a majority of the legal voters, to issue bonds to aid in constructing railroads in either or all. The facts in the case presented a question as to the validity of bonds issued by Red Rock under the act of 1868 after the passage of the act of 1870.

Although the subject-matters of the two acts appeared by *the letter* to be the same and the provisions thereabouts inconsistent, yet by referring to the map of the State the court concluded that the subject-matters were different, and that the *former* provision was probably intended for roads running *east and west* and the *latter* for roads running *north and south*. The court added that its conclusion in favor of the validity of the bonds in suit was recommended also by a consideration of the improbability that the State intended by the later act to violate quasi rights which had arisen under the former, even although within its power.

In both of the above points the case now under discussion conforms to that just cited, viz., an apparent statutory inconsistency explicable by extraneous matter, and an inducement to adopt the explanation arising from a duty owing by the Government to certain imperfect rights of property protected by such explanation.

In McCool *vs.* Smith, 1 Black, 459, an Illinois statute of 1857, which operated retrospectively to validate claims to inherit by illegitimate children and their previous sales of land subject to such rights, provided that "in all such cases" [of sale] the conveyance should vest title *from its date*, and that "in all actions and courts" such grantee should be deemed the owner from such date.

In 1854 an illegitimate had conveyed the land in question, and by a deed executed in April, 1855, the vendee had conveyed to the plaintiff, who brought the pending suit in July of that year.

Thereupon, by taking into consideration (1) a previous

statute of that State which provided that plaintiffs in actions for land must have title thereto at the commencement of the suit, and (2) the hardship of making a defendant liable to costs by a statute passed after the suit had begun, it was held that "*all such cases*" and "*all actions*" did not mean cases in which actions were pending at the time of the enactment.

The late cases of *Ex parte* Crow Dog, 109 U. S., 556, and Chew-Heong, 112 U. S., 536, are also important as showing the unwillingness of the courts to allow that a later affirmative statute, even by language strongly implying it, repeals a previous statute or treaty where reasons outside of such language show that it is not so intended.

In conclusion, to notice briefly certain miscellaneous points made in appellant's brief:

1. "The Cherokee Tobacco Case," 11 Wall., 616, decides no more than that a subsequent statute repeals a previous treaty with which it is irreconcilable. The principle announced is not denied by us.

2. The quotations of section 2 of the treaty of 1865–1867, found in appellant's brief at pp. 3 and 34, 35, is incorrect, as it fails to note the amendment made thereto prior to its proclamation. (14 Stats. L., 692, 693.)

3. Inasmuch as section 12 of the appropriation act of July, 1876 (cited, p. 5), begins with the words, "That whenever the Great and Little Osage Indians *shall agree* thereto," no *disposal* of land thereunder can be cited, as *by the mere will of Congress*, overriding previous treaties with those Indians. The fact of agreement was left with the Indians; *its force*, with the President.

4. The policy of the United States in regard to *sections* 16 *and* 36 is so definite, so uniform, and stands upon so high a principle that without more it may well be *read into* all agreements for large cessions of land by Indians; with the effect that the United States will hold itself responsible for the price of those parts of such cessions. No valid deduction can be drawn from a long series of statutes concerning this great public *charity* to a single statute supposed to donate certain Indian trust lands to private persons for homesteads.

But the argument adduced can have no application in the present case, for in the act of 1861, admitting Kansas into the Union (12 Stats. L., 126) and granting to it the 16th and 36th sections in every township of public lands in said State, Congress carefully stipulated that such sections of lands within Indian reservations in said State "should not be alienated for any purpose except with the consent of the Indians of such reservations *and in accordance* with the conditions of the treaty authorizing such alienation," and by act of June 16, 1880 (21 Stats. L., 291), *supra*, an appropriation was made to pay to the credit of the custodian of Osage trust funds the amount due by virtue of the granting and consequent alienation of these 16th and 36th sections, the computation of amount due to be based upon the amount of such lands ceded both by the first and second articles of the treaty of 1865–1867.

We submit with confidence that the act of December 15, 1880, did not repeal or modify that of May 28, 1880, but has its complete effect in disposing of such lands within the Fort Dodge reservation as by the abolition of that reservation and a survey of the lands previously within it by general law would have become "public lands," and did not apply to that small fraction of the contents of that reservation (less than one twenty-fifth of the whole) which by its

abolition would, by statutes passed prior thereto, have become simply "Indian trust lands." In other words, the act of December intended to dispose of the title to those lands which, by the abolition of the reservation, were to fall upon the hands of the United States *unprovided for*, and, therefore, not to dispose of any part of that reservation which were not so to fall.

FROST'S BONA FIDES.

But passing from the discussion of the intention of the act of December 15, 1880, to that of Frost's compliance with it, we find his *bona fides* fatally defective.

The bill of complaint shows that the Department of Interior found as facts:

(1.) That Frost's entry was made at Dodge City and not at the local office, which could only have been done by the collusive aid of the register.

(2.) That he was permitted to make his entry before the public had received notice that this land was subject to appropriation, thereby defrauding the public of its equal right with Frost to have entered this land.

(3.) That Frost was not an actual settler upon this land, as the very act under which he claims requires he should have been.

Either one of the above causes is sufficient to defeat Frost's claim, even if the applicability of the act of December 15, 1880, as contended for by him be granted.

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